



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL CASE 114 OF 2007

ZIPPORAH WANGUI.....PLAINTIFF

VERSUS

OLIVE FARM LIMITED & 3 OTHERS.....DEFENDANTS

RULING

This is a Notice of Motion made under Section 3A of the Civil Procedure Rules by the plaintiff seeking the orders of this court of mandatory injunction to compel the defendants jointly and severally to unconditionally return to the plaintiff her seized tools of trade, namely a Deep Freezer make Ramtons and Deep Frier cooker. The application is premised on the grounds that the plaintiff contends that the defendants stormed into her premises and seized her tools of trade without any court order or any legitimate or valid claim. The plaintiff contended that the defendants' act in seizing her goods amounted to a criminal act. The application is supported by the annexed affidavit of the plaintiff, Zipporah Wangui. The application is opposed. Charles A. Njoroge, the Managing Director of the 1st defendant swore a replying affidavit in opposition to the application. In the said affidavit, he deponed that the plaintiff's claim lacked foundation in law. He deponed that the plaintiff offered the said goods to the defendants so that the defendants would forebear from pursuing a criminal case which had been instituted against her for misappropriation. He urged the court to disallow the application and dismiss it with costs.

At the hearing of the application, Mr. Karanja for the plaintiff reiterated the contents of the plaintiff's application and supporting affidavit. He submitted that the ownership of the seized goods was not in dispute since the defendants had acknowledged that the same belonged to the plaintiff. He submitted the defendants had seized the said goods from the plaintiff on the 16th May 2007. He urged the court not to accept the explanation by the defendants that they had taken the said goods as lien or security over certain sums of money which the plaintiff had allegedly misappropriated. He submitted that as a result of a complaint made by the defendants, the plaintiff was charged with the offence of theft by servant. He submitted that the case was still pending determination at the Naivasha Chief Magistrate's Court. Mr. Karanja maintained that there was no good reason why the goods which are unlawfully being held by the defendants should not be released to the plaintiff. He submitted that the plaintiff had not handed over the said goods to the defendants voluntarily. He reiterated that there was no civil suit which had been filed by the defendants which permitted the said attachment. He submitted that the business of the plaintiff had suffered since the said properties were unlawfully seized from her. He urged the court to allow the application and grant the order of mandatory injunction sought.

Mr. Kihara for the defendant opposed the application. He reiterated the contents of the replying affidavit filed by Charles Njoroge, the Managing Director of the 1st defendant. He submitted that the pleadings

filed by the plaintiff did not support her application to be granted orders of mandatory injunction. He submitted that the plaintiff had voluntarily surrendered the two items to the defendants in lieu of the amount she owed the defendants. He maintained that the plaintiff was charged with the criminal offence before the present suit was filed. He submitted that the defendants did not destroy the sausages as claimed by the plaintiff. He reiterated that no prejudice had been occasioned to the plaintiff when he surrendered the said items to the defendant. Kihara submitted that the allegation by the plaintiff that she had lost business was untrue since the premises she used to conduct her business is now being operated by another person. He urged the court to dismiss the application with costs.

I have carefully considered the rival submission made by counsel for the plaintiff and counsel for the defendant. I have also read the pleadings filed by the parties to this application in support of their opposing positions. The issue for determination by this court is whether the plaintiff has established a case to enable this court grant her an order of mandatory injunction sought. The principles to be considered by this court in determining whether or not to grant the mandatory injunction are well settled. In **Kenya Breweries Ltd & Anor. vs Washington O. Okeyo CA Civil Appeal No.332 of 2000 (Nrb) (unreported)**, the Court of Appeal held at page 3 of its judgment as hereunder;

“The test whether to grant mandatory injunction or not is correctly stated in Vol.24 Halabury’s Laws of England 4th Edn. Para 948 which reads;

‘A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff... a mandatory injunction will be granted on an interlocutory application.’”

Also in Locabail International Finance Ltd vs Agro export & others [1986] ALLER 901 at page 901 it was stated;

‘A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction the court has to feel a high degree of assurance that at the trial, it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction’

The principles of law enunciated by these decisions have received full approval by the courts within our jurisdiction. See the case of Bell Maison vs Yaya Towers Limited HCCC No.2225 of 1992 Bosiere J, (as he was then) and Ripples Limited vs Kamau Mukha HCC No.4522 of 1992 per Mwera J.”

In the present application, the plaintiff deposed that her properties, namely a deep freezer make Ramtons and a Deep Fryer cooker were unlawfully taken from her possession by the defendants. It appears from the affidavit of the managing director of the 1st defendant that the 1st defendant made a complaint to the police concerning the conduct of the plaintiff, who was at the material time, an employee of the 1st defendant. The 1st defendant complained that the plaintiff had misappropriated goods worth Ksh.117,616/= . The plaintiff was subsequently charged with the offence of stealing by servant contrary to **Section 281 of the Penal Code** at the Naivasha Chief Magistrate’s Court vide **Naivasha CMC CRC No.887 of 2007**. The hearing of the said case is yet to be conducted. The 1st defendant deposed that the plaintiff offered the two items to it to hold as a lien until the sum owing had been paid. On her part, the plaintiff contends that the defendants unlawfully took the said properties from her possession.

I have evaluated the facts of this case from the affidavits sworn by the parties to this suit. The story put forward by the 1st defendant as to the circumstance under which it took possession of the said two items from the plaintiff does not add up. If the plaintiff offered the said item as lien, where is the agreement

signifying such consent by the plaintiff for the said items to be held as lien? If the plaintiff offered the said items as lien pending the payment of the amount allegedly misappropriated, why then did the 1st defendant complain to the police resulting in the plaintiff being charge with the offence of stealing by servant? It is evident that there existed no agreement for the plaintiff to surrender the said properties as lien pending the payment of the sum allegedly misappropriated.

The plaintiff disputes that he owes the money to the 1st defendant. There is a pending criminal case which is yet to be determined to establish whether the plaintiff misappropriated the said sum complained of by the 1st defendant. The plaintiff has established, on a balance of probabilities, that the defendants unlawfully removed from her possession the said two properties. The defendants have not exhibited any legal instrument that would have authorized them to hold the said properties belonging to the plaintiff. In the circumstances of this case, I hold that the plaintiff has established that she is entitled to possession of the said properties.

I therefore hold that the plaintiff established special circumstances that would enable this court to grant her application for an order of mandatory injunction. The defendants, jointly and severally, and or by their servants or a agents are hereby compelled by an order of mandatory injunction to unconditionally return to the plaintiff's possession one Deep Freezer, make Ramtons and one Deep Fryer Cooker within fourteen (14) days of today's date. The plaintiff shall have the costs of this application.

DATED at NAKURU this 23rd day of November 2007.

L. KIMARU

JUDGE