



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT KAKAMEGA**  
**CIVIL CASE 105 OF 2006**

**JAMA ABDI :::::::::::::::::::::::::::::: PLAINTIFF/APPLICANT**

**VERSUS**

**ISAAC MUTUMBI LIJOODI :::::::::::::: DEFENDANT/RESPONDENT**

**RULING**

In the suit herein, the Plaintiff seeks, inter alia, permanent injunction to “*restrain the defendant ..... from leasing portions of land reference Number 8/1/69 Kakamega or interfering with the Plaintiff’s quiet possession of the said property until this suit is determined.*” The Plaintiff’s claim against the defendant in the suit herein is that the Plaintiff was a protected tenant in respect of the said property within the meaning of the provisions of the Landlord and tenant shops hotels and catering establishments Act, Cap 301 and that defendant had unlawfully and wrongly denied the plaintiff access to the said premises to operate his business in breach of the provisions of Landlord and Tenant (Shops Hotels and catering Establishment). The Defendant entered appearance on 08-12-2006. No defence has been filed yet.

In his application by Chamber Summons dated 9<sup>th</sup> November, 2006, the Applicant seeks inter alia, a temporary injunction:

(1) That a temporary injunction do issue restraining the Defendant by himself, his servants or his agents or authorized persons and otherwise howsoever from leasing portion of Land Reference Number Plot No. 8/I/69 Kakamega, or interfering with the quiet possession by the Plaintiff of the portion of Plot Number 8/I/69 Kakamega Municipality until this suit is determined.

2 That a temporary injunction do issue compelling the Defendant himself and/or his agents or authorized persons to restore and or reinstate the plaintiff to the suit premises pending the hearing an determination of the suit.

The application was supported by the Applicant’s affidavit sworn on 16.11.2006. In paragraphs 3, 4, 5, 6, 7, 9, 10, 11, 13 and 14 of the Applicant’s affidavit, the latter stated:-

3. That I was at all times a tenant of portion of the Defendant’s Plot No. 8/I/69 Kakamega Municipality operating a business of a restaurant (Hereinafter referred to as the suit premises).

4. That I have been operating a hotel known as Spark Hotel and paying rent regularly on time to the Defendant for almost 37 years now.

5. That I aver that at no time during the subsistence of the Tenancy did I ever default in payment of rent. Annexed hereto and marked “JA1” are copies of the receipts showing the payments.

6. That the Defendant came to me on 10<sup>th</sup> February 2006 and informed verbally that he would carry out minor repairs, renovations and painting of the suit premises and that I would have to stop carrying on the business for one or two months.
7. That on 11<sup>th</sup> February 2006 I stopped my business and allowed the Defendant to carry out the minor repairs and renovations of the business premises leaving all my tools of trade in the suit premises.
9. That the Defendant completed the renovation of the suit premises and informed me verbally that I will open up the business in September, 2006.
10. That the Defendant prevented me from carrying on my business at the suit premises  
when he completed the repairs and locked me out of the business.
11. That as a result of the Defendant's conduct and obstruction I was out of business from 11<sup>th</sup> February 2006 to date.
13. That despite the pending Reference the Defendant has unlawfully taken possession and has denied me access and quiet enjoyment of the suit premises and has locked in my tools of trade in the suit premises and is about to lease the same to a third party to my detriment.
14. That consequently thereof my business reputation and good will has suffered loss and damage to the tune of Kshs.5,000.00 daily.

The said application was opposed by the Defendant/Respondent who filed a Replying affidavit on 8.12.2006 in which he, inter alia, averred in paragraphs 6, 7, 8, 9, 10 and 11 as follows:-

6. That it is not true that I have now started negotiating with a third party and I am just about to lease out the suit property.
7. That in fact, I leased out the suit property to another tenant on 1<sup>st</sup> October 2006 way before the Plaintiff filed the reference at the tribunal, leave alone this suit. Annexed hereto and marked "IML1" is a copy of the lease agreement between me and the third party.
8. That it is in light of the foregoing that I believe that the plaintiff has only brought this suit and Application as an afterthought having noticed that his chances at the Tribunal are close to nil.
9. That further, since the premises have already been let to a third party, the Plaintiff is seeking orders which, if granted shall adversely affect the rights of a third party who the plaintiff has not made party to this suit.
10. That in any event, I have been informed by my advocate on record which information I verily believe to be true that this court lacks jurisdiction to entertain this matter in the first instance against the clear provisions of Cap. 301.
11. That it is against this backdrop that I oppose the Plaintiff's Application aforementioned and pray that the same be dismissed with costs.

The power to grant or refuse interlocutory injunction is discretionary. The court will exercise that power guided by what will meet the ends of justice and in accordance with the law. The conditions for the grant of interlocutory injunction were well set out in the case of ***GUILLA v. CASSMAN BROWN & CO. LTD. (1973) EA 356 at page 360.*** These are existence of probability of success, likelihood of irreparable injury which would not be adequately compensated for by damages and balance of convenience. The object of interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty

were resolved in his favour at the trial .....see **lord Diplock in American Cyanamid Co. v, Ethicon Ltd. (1975) AC 396 at pg 406 and 408.**

It is now settled that a person cannot wrongfully and illegally bring about a state of affairs and then apply to court to preserve the state of affairs as the status quo by way of injunction and by the same token, such person cannot be allowed to put up a defence that the subject matter of the case outside the reach of the court so as to make the Applicant's quest for redress a pipe dream and the court a toothless bulldog if he is responsible for putting the subject matter outside the court's reach. In **Thompson v. Park (1944) 2 ALL ER 477, Goddard LJ** (as he then was) said at page 479 of the report that **"a litigant cannot wrongfully and illegally bring about a state of affairs and then apply to the court to preserve that status quo by way of injunction. The status quo that could be preserved was the status quo that existed before these illegal and criminal acts on the part of the defendant."** Thompson v. Park (supra) was applied by the court of Appeal in Kenya in **KAMAU MUCHUHA v. THE RIPPLES LTD. (C.A. Civil Application No. NAI. 186 of 1992.**

The Defendant/Respondent may not have sought injunction to preserve the status quo. He wrongfully violated the Applicant's right to controlled tenancy in the said premises under the guise that he has parted with the same to a third party who is an innocent party. It was not denied by the Defendant that the applicant's tenancy has been controlled with the meaning of the provisions of section of the Landlord and Tenant (Shops Hotels and Catering Establishments) Act. The allegations of trickery are not denied, nor are the allegations that the Applicant's goods and property are still in the premises. The Defendant does not disclose the identity of the alleged innocent third party behind whom he is hiding so as to deprive the Applicant of the controlled tenancy. The Applicant has come to court because the Defendant has manifested intention to lease the property to a third party and he seeks to stop this. In **Kamau Muluha v. The Ripples Ltd.** the court of Appeal in Kenya pointed out that the court of Appeal in England had in Park v. Thompson held that **"it is fallacious for a person who forcibly and viciously enters premises to maintain that his occupation of these premises is the status quo which must be maintained, and not disturbed, which of course in very many cases is the object of a temporary injunction to keep things in status quo so that the property in question is maintained, as far as possible, intact until the final determination of the suit."**

The Respondent/Defendant in the instant case is seeking to use unidentified third party so as to frustrate the right of the Applicant and as a weapon to forestall any possibility of an order for repossession. But just as the court will not allow a litigant to wrongfully and illegally bring about a state of affairs and then seek a court order for maintenance of that state of affairs as the status quo, the court will also not countenance the gimmick of a litigant that an innocent third party whose identity is undisclosed and who may not even exist to act as a weapon to serve justice.

It is my finding in this case that justice dictates that the law be enforced so as to do justice by restoring the applicant in the premises pending the determination of the suit. To fail to do so would be to render the law meaningless and scandalous. The confidence of the public cannot be enhanced by failure to do justice in accordance with the law nor by acting in a manner that renders the court a toothless bulldog.

I find merit in the application. Interlocutory injunction shall issue to protect the Applicant against injury by violation of his right to enjoy the controlled tenancy for which he could not be adequately compensated in damages recoverable in the

suit when the dispute is determined. In the result, I allow the application. I grant prayers 3 and 5 of the said application. Costs shall be in the cause.

**Dated at Kakamega this 8<sup>th</sup> day of November, 2007.**

**G. B. M. KARIUKI**

**J U D G E**