REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU

Civil Appeal 133 of 2005

NABAT KANJI .....1ST APPELLANT

AZIM KANJI .....2ND APPELLANT

-VERSUS-

SADRUDIN BHANJI KANJI .....RESPONDENT

JUDGMENT

Coram J. W. Mwera, Judge,

D. Otieno for Appellants,

Gichaba for Respondent

Raymond CC.

On 27.10.2005, the learned Senior Resident Magistrate, delivered a ruling in WINAM SRMCC 494/2005, granting an injunction that the respondent had sought against the appellants in a chamber summons dated 30/8/2005, and brought under Order 39 rules 1, 2, 9 of Civil Procedure Rules, Section 3A, 63 of Civil Procedure Act.

Going by the principal pleadings as they stand, the respondent/plaintiff described himself as:-

"..... one of the registered proprietors and/or landlords of that propertied known as LR. Kisumu Municipality Block 7/342 Kisumu .....",

and that -

" ..... the defendants were the plaintiff's tenants in respect of a specific portion of the tenancy premises on the above plot ..... (trading) ..... under the name and style of M/s Labella Restaurant".

The import of setting out those parts of the plaint is that it arose during arguments in this appeal that the respondent ought not to have sued all alone while he had co - proprietors of the suit premises and that the 2nd appellant was wrongly sued because he was not a co - tenant of the 1st appellant. The suit it self is still pending; this appeal only concerns the injunction order.

Mr. D. Otieno for the appellants presented the 5 - point appeal which Mr. Gichaba opposed. Briefly, the suit property was gutted down by fire, whereby the appellants could not carry out their business there. They made moves to repair the place but this did not go down well with the respondent. So he sued for

reliefs which included orders injuncting the appellants from carrying out the repairs to the building. It had been insured and somewhere in the pleadings, and the submissions here as in the court below, that featured.

In Mr. Otieno's view, the respondent did not make out a **prima facie** case in the court below to warrant an injunction. That it had been pleaded in the defence and during the arguments when the injunction application came up for **inter partes** hearing that the 2nd appellant was **not** a co - tenant of the 1st appellant and or that the respondent landlord knew or ought to know who his tenant was. That the respondent did not take heed of this, namely, that he had sued a wrong party and he stood no chance of succeeding against him. Also that the respondent was told in the same manner that he had no capacity to sue on his own, leaving out other co - proprietors - a thing which he again ignored. The court further heard that the respondent had concealed some material from the court when he approached it to obtain the **ex parte** orders. The concealed matters, it was said, were in the nature of payment of insurance money (compensation) following the fire incident. That the respondent had represented to the lower court that before his insurance concluded the compensation exercise, which would be followed by authority to begin the repairs, the appellants were rushing to begin the job - an act that would jeopardize the respondent's claim from his insurance. That the true position was that the respondent was paid long before these proceedings were brought and thus he obtained an injunction by telling false-hoods.

There was a memorandum of agreement in respect of the tenancy of these premises which was not dated and neither party had signed it. It was submitted that by it, and some other communication, the appellants had been given authority to repair the premises and thus, the respondent could not be heard to say that they had no right to do so.

On the whole, the appellants' case was that a **prima facie** case had not been made out and so the injunction would not issue.

Then, they moved to argue whether damages would compensate the respondent in the event that by refusing the injunction, loss would befall him. It was presented that this ground, forming the three main principles to be considered when a temporary injunction is sought, was not gone into adequately.

The argument then moved to the area of bad faith. That the respondent actually wanted to use this object of repairs to change the terms of tenancy with the appellants - and not for its own genuine sake. And lastly, that the learned trial magistrate imported evidence into the whole thing by "**finding**" that the respondent had been ready to carry out the subject repairs.

Mr. Gichaba had a different view of this case. He told the court that the original, primary and rightful duty to repair tenanted premises lay with the landlord - the respondent. And the appellants could only carry out that job with the consent of the respondent which he never gave. The memorandum of agreement was seen as of no force except to be considered only as what was intended. This was premised on the fact that the exhibited memorandum was neither signed nor dated. That when the building was burnt down and thus the appellants left, there was no longer a tenant - landlord relationship. That a prima facie case was made out when the landlord/respondent moved to repair his own property and he showed the capability and willingness to do so. That this did not depend on insurance compensation. That the respondent considered the 2nd appellant as a co - tenant of the 1st appellant from the way he conducted himself. Not a very convincing position for a landlord, but there it was. That in case there was misjoinder or non - joinder of parties that could not defeat the suit and if the 2nd appellant was wrongly sued, he would seek the court to strike him out as a party. That with the respondent feeling that his property rights were threatened, he did well to sue, all on his own, even when he had co - proprietors. And that the learned trial magistrate decided the injunction - application on a balance of convenience.

It should be admitted that counsel went into more matters than what is reproduced above. But that suffices for the determination of this appeal.

Making out a **prima facie** case in these circumstances is done when a party shows that its claim as it stands can warrant a relief. Relief against one person or all those sued. The respondent showed, albeit in

a one sided way, that he had proprietary rights in the suit premises. He was a co - proprietor thereof. He may have sued the 2nd appellant wrongly or that he excluded other co - proprietors from the suit without exhibiting evidence of their authority or other. But be that as it may. Those are matters in the suit and a party wrongly sued or excluded could still apply for appropriate orders. As for the injunction application, it was sufficient for the respondent to show and it is not in dispute that he had rights in the subject property, yet without his consent or authority, the appellants, tenants were intending to repair it. If he did not allow at first, then he was right to stop it by injunction. The primary duty to repair a house in the circumstances like those prevailing here lay with the respondent/landlord.

The issue of concealment of material: When one approaches a court in the first instance for **ex** - **parte** orders, it is cardinal and has been litigated and ruled on time without number, that such a party should be forth right and candid on all material relied on to get **ex** - **parte** orders. Lack of that disentitles him from orders sought. This court was not satisfied that that ground was articulated here to a level to warrant upholding that the respondent did misrepresent to the lower court or conceal from it such vital material as should have resulted in refusing the injunction.

The court then went over the ruling under review. The learned trial magistrate delivered himself at the end of it:

"On the balance of convenience, it would be prejudicial to allow the defendant/respondent to repair the building at their costs and purport to claim compensation from the landlord later".

On this note, it is concluded that the learned trial magistrate considered the aspect of a **prima facie** case with a probability of success first, then glossed over the adequacy of damages to compensate, but settled for the third principle of balance of convenience in the case. He found for the respondent and, this court thinks, properly so.

In sum, the appeal is dismissed with costs.

Ordered and delivered on 31/5/2006.

J. W. MWERA

JUDGE

JM/hao