



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 353 of 2006

FLORENCE I. MAKOTSI T/A OUR CONNECTIONS & ANOTHER.....PLAINTIFF

VERSUS

FORTUNE PROPERTIES LIMITED & ANOTHER.....DEFENDANT

R U L I N G

In a plaint filed on 4.7.2006 it is averred that the 1st plaintiff executed an unregistered lease with the 1st defendant pursuant to which the 1st plaintiff took possession of premises on L.R. No.1870/IX/140 in which she operated a cyber café using computers seats and tables hired from the 2nd plaintiff. It is also averred that the said items plus printers, scanner, Ups Equipment Voice of Internet Protocol (VOID) equipment and ADSL Equipment, Telephone Gargets Networking cables, Hubs and Assorted Motor vehicle parts all valued at about KShs.822,900/= which the 1st plaintiff was using in the said Cyber Café belong to the 2nd plaintiff who is not a tenant of the 1st defendant. It is further averred that on or about 31.3.2006 the 1st plaintiff gave notice to the 1st defendant to terminate the tenancy and be allowed to pay all outstanding arrears if any but the 1st defendant did not respond to the said request until 31.5.2006 when the 1st defendant forcefully evicted the 1st plaintiff from the premises and detained all the goods and computers listed above on the grounds that the 1st defendant did not want the 1st plaintiff to terminate the lease unless she paid rent upto September, 2006. It is further averred that as at 31.3.2006 the 1st plaintiff had paid rent for the month of January, 2006 and taking into account the deposit which had been paid only a sum of KShs.15000 was outstanding on account of rent and KShs.18,529.25 on account of electricity charges as at 30.4.2006. It is also averred that following refusal by the 1st defendant to accept the said arrears of rent and electricity charges the 1st plaintiff deposited the same into the 1st defendant's account with Paramount Universal Bank Limited on 15.6.2006. It is further averred that immediately the said deposit was made the 1st defendant instructed the 2nd defendant to levy distress on the plaintiff's goods and computers which had been detained in the demised premises, following the said forceful eviction of the 1st plaintiff from the premises. It is further pleaded that the 2nd defendant proclaimed all the goods and computers which had been detained by the 1st defendant on 15.6.2006 which proclamation was backdated and did not have all the goods and computers in the said proclamation. The plaintiffs further state that the 1st defendant was selling to the 1st plaintiff electric energy supplied by Kenya Power and Lighting Company contrary to the Law and that the 1st defendant was levying V.A.T. and not remitting the same to Kenya Revenue Authority. In the premises the plaintiffs claim against the defendant refund of monies paid to the 1st defendant by the 1st plaintiff on account of electricity charges which ought to have been supplied by Kenya Power & Lighting Company. The plaintiffs also claim general damages for illegal distress unlawful eviction from the demised premises and detention of the 2nd plaintiff's goods and chattels and loss of business by the 1st plaintiff. The plaintiffs also pray for a

mandatory and or a permanent injunction compelling the defendants to release all the goods, computers and chattels listed above to the plaintiffs forthwith in default of which the defendants be compelled to pay their market value estimated at KShs.822,900/-.

Simultaneously with the filing of the plaint the plaintiffs filed an application by way of Chamber Summons seeking two primary orders expressed in the following terms:-

(2) That a temporary or a mandatory injunction be issued compelling the defendant to release and return to the plaintiffs/applicants forthwith all goods chattels and computers which had been detained unlawfully proclaimed and attached by the defendants from the demised premises for the purpose of levying distress for rent and which distress is illegal.

(3) That a temporary or a mandatory injunction be issued compelling the 1st defendant to refund to the 1st plaintiff all the monies paid to it on account of electricity charges which electric energy ought to have been supplied to he 1st plaintiff by Kenya Power and Lighting Company Limited..

The grounds for the application on the face of the application are that the goods, chattels and computers and its equipment detained and attached by the defendants from the demised premises are owned by the 2nd plaintiff who is not a tenant of the 1st defendant; that there is no rent which is in arrears at the time of the proclamation and attachment of the goods chattels; that the 1st defendant is not licenced to supply electric energy to consumers and that the applicants have discovered the 1st defendant was converting and selling electric power to the 1st applicant illegally without the knowledge of Kenya Power and Lighting Company Limited and the government; that the said computers and equipment are tools of trade hired by the 1st plaintiff from the 2nd plaintiff for purposes of operating the said cyber café and that the applicants herein have overwhelming chances of success and the balance of convenience tilts in favour of the applicants.

The application is expressed to have been brought under the provisions of Order 39 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

The application is supported by affidavits sworn by the plaintiffs. The depositions in the affidavits elaborate the averments in the plaint and the grounds on the face of the Chamber Summons.

The application was filed under a certificate of urgency and was placed before me on the same date i.e. 4.7.2006. Upon hearing counsel for the plaintiffs and upon perusing the application and the supporting affidavits, I certified the application urgent and granted a temporary order of injunction pending the hearing of the application inter partes on 14.7.2006.

When the application came up before me on 14/7/06 for interpartes hearing, counsel for the 1st defendant raised a Preliminary Objection to the application on 3 grounds namely that:-

- 1) The application for injunctive relief cannot issue since a statutory remedy is provided by the Distress for Rent Act.
- 2) The application is fatally defective for combining a prohibitory and mandatory injunction in a Chamber Summons.
- 3) The application is in essence seeking final orders under the guise of an interlocutory application.

Counsel for the 1st defendant was brief and to the point. He argued that as the plaintiffs in their application seek both temporary and mandatory injunctions, a chamber summons is not the competent manner of seeking relief. For this proposition reliance was placed upon the cases of **Morris and**

Company Limited –vs- Kenya Commercial Bank Ltd and Others [2003] 2 EA 600 and **Salume Namukasa –vs- Yezefu Bukya [1966] E.A 433**. On the same authorities counsel submitted that there is no jurisdiction to grant a mandatory injunction under Order 39 of the Civil Procedure Rules.

Counsel referred to Section 8 of the Distress for Rent Act and submitted that the same specifies the sums payable in the event of an irregular distress for rent and hence the application for injunction is misconceived.

Counsel also submitted that the plaintiffs seek final orders in an interlocutory application which is contrary to express provisions of Order 39 of the Civil Procedure Rules. For those reasons counsel urged me to strike out the application.

In response to the Preliminary Objection, counsel for the plaintiffs submitted that counsel for the 1st defendant was stealing a march from the plaintiffs. That was because the plaintiffs had filed contempt proceedings against the defendants which proceedings relate to orders given pursuant to the same application that is sought to be struck out. Counsel further argued that the objection with respect to the competence of the application was infact a challenge based on form and not substance and under Section 3A of the Civil Procedure Act should not be allowed. In counsel's view the court should decide the application on substantive justice and not on technicalities as the 1st defendant had not shown that it would be prejudiced in any way if the merits of the application are considered.

I have considered the Preliminary Objection and the submissions made to me by counsel. Having done so, I take the following view of the matter. A plain reading of the plaintiff's application clearly reveals that the plaintiffs seek orders of mandatory injunction a part from the prayer for costs. The mere use of the word "**temporary**" does not change the primary orders sought from mandatory orders of injunction to prohibitory ones. That being my view, it would appear that there would be no jurisdiction to entertain the plaintiff's application under Order XXXIX which primarily deals with prohibitory interlocutory orders. The Civil Procedure Rules do not provide for a particular mode of seeking the relief of a mandatory injunction. Under Order L Rule 1 of the Civil Procedure Rules therefore such a relief can only be sought by way of a Notice of Motion and the court will consider the motion on Notice under Section 3A of the Civil Procedure Act. Faced with such a situation Ringera J as he then was in **Morris and Company Ltd –vs- Kenya Commercial Bank Limited and Others (Supra)** observed as follows: at page 607

“Interlocutory mandatory injunctions are not contemplated by Order XXXIX of the Civil Procedure Rules. An application for a mandatory injunction can only be made pursuant to the provisions of Section 3A of the Civil Procedure Act and the procedural mode is a motion on notice pursuant to Order L rule 1 of the Civil Procedure Rules. In an application where the plaintiff seeks both interlocutory prohibitive and mandatory injunctions it is incumbent to do so on a motion on notice for under the procedural law it is established that where a matter partly falls within the scope of a summons in chambers and partly within a motion on notice, the motion is to be invoked.”

In the application at hand only mandatory injunctions are sought. The plaintiffs should therefore have moved the court by way of a Notice of Motion and not a Chamber Summons.

Udo Udoma C. J. as he then was in **Salume Namukasa –vs- Yozefu Bukya (Supra)** found that failure to move the court in the proper manner rendered an application incompetent and that the inherent jurisdiction of the court could not be invoked to save the application. He rendered himself at page 435 as follows:-

“Counsel must understand that the Rules of this court were not made in vain. They are intended to regulate the practice of the court. Of late a practice seems to have developed of counsel instituting proceedings in this court without paying due regard to the Rules. Such a practice must be discouraged. In a matter of this kind, might the needs of justice not be better served by this defective, disorderly and incompetent application being struck out?”

The Learned Judge did exactly that. He struck out the application which had been commenced by way of Chamber Summons rather than by Notice of Motion.

With regard to the submission that the plaintiff's remedy is provided by statute and injunction is not available I have found as follows. The plaintiffs by their plaint seek damages in addition to the orders of injunction. The damages are claimed for illegal distress, detention and/or conversion of goods and chattels, loss of business and unlawful eviction. With regard to the alleged illegal distress detention and or conversion of goods and chattels there is a clear statutory remedy provided under Section 8 of the Distress for Rent Act Cap 293.

The plaintiffs' claims are contained in paragraphs 17, 18 and 19 of the plaint. Paragraph 17 appears to be a claim made on behalf of Kenya Power and Lighting Company Limited. Paragraph 18 is the claim for damages for the illegal distress unlawful eviction and detention of goods chattels and loss of business. Paragraph 19 is for the mandatory injunction. This paragraph has an alternative prayer for KShs.822,900/- being the market value of the goods for which the injunction is sought. The plaintiffs themselves have therefore quantified their claim with respect to the goods/chattels for which the injunction is sought. In the premises besides the statutory remedy available to the plaintiffs, their entire claim is capable of being ascertained and damages are clearly an adequate remedy.

For all the above reasons, I uphold the Preliminary Objection and, order that the plaintiffs' application be and is hereby struck out with costs to the 1st defendant.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 31st day of July, 2006.

F. AZANGALALA

JUDGE

31/7/2006

Read in the presence of:-