



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

Civil Case 824 of 2006

**DUBOW JELLE IBRAHIM.....
.....PLAINTIFF**

VERSUS

**GRACE WANJIKU KABUI.....1ST
DEFENDANT**

MACHARIA KABUI (Sued as the administrators

**Of the estate of MR. KABUI KIGERA).....2ND
DEFENDANT**

RULING

By a Plaint dated 27th June 2006 the plaintiff sued the defendant seeking various reliefs. Simultaneously with the plaint the Plaintiff brought a chamber Summons under Certificate of Urgency and expressed to be brought under Order 39 Rules 1, 2 and 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking the following orders:-

(1)

(2) A temporary injunction be and is hereby issued restraining the defendants jointly and severally whether by themselves, their agents, managers, servants and/or employees from evicting, interfering, meddling, disturbing the plaintiffs' peaceful and quiet enjoyment possession, and occupation of the suit premises or interfering with the same in whatever manner all that property known as LR NO. 36/VII/409 pending the hearing and final determination of the application herein.

(3)

(4) A temporary injunction be and is hereby issued restraining the defendants jointly and severally whether by themselves or their agents, servants, managers or employees from compelling, or forcing the plaintiff to pay the rent due to them or to any other party or person other than his lawful land lords herein pending the hearing and final determination of the application herein.

This application by the plaintiff came up for hearing before Visram J who after careful consideration of the matter came to the conclusion that the plaintiff had established a prima facie case with a high probability of success. Consequently the learned Judge granted the prayers sought by the plaintiff.

The learned Judge expressed himself thus:

1. Based on the reasons outlined in the application, this matter is certified urgent.
2. I grant a temporary injunction for 14 days in terms of prayer 2 of the Chambers Summons dated 27th July 2006 on condition that an undertaking as to damages is filed by the applicant by 31st July 2006.
3. Prayer 4 is allowed pending inter-parties hearing and determination.
4. Application to be served.
5. Hearing inter-partes on 7th August 2006.

On 7th August 2006 when the application came up for hearing inter-partes. Mr. Kimondo informed the court that the application was served on him on 4th August 2006 and he had not filed a replying affidavit and asked for time to enable him file the replying affidavit. It was agreed by consent that he files a replying affidavit within 14 days and the application was stood over to 26th September 2006 for inter-partes hearing and the interim orders were extended until then. When the application came up for hearing on 26th September 2006, a new development had emerged. MABACHA INVESTMENTS LTD had applied to be joined as a 3rd defendant in these proceedings. Both parties recorded a consent order that Mabacha Investments Ltd be joined as the 3rd Defendant and to file and serve its papers within the next 3 days and the reply to the defence if any to be filed within 5 days from the date of service.

There was also another development. On 30th August, 2006 the defendant had brought a Chamber Summons under VI Rule 13 (1) (b) (c) and (d) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking to strike out the plaintiff's plaint.

The parties agreed by consent that both applications be heard on 18th October 2006 and Mr. Ahmednasir for the plaintiff applied to have the interim orders extended which application was objected to by Mr. Machira counsel for the defendant who submitted that the ex parte orders were granted on 28th July 2006 and were extended by consent on 7th August 2006. He went further to submit that the ex parte orders were extended on the basis that the plaintiff was a tenant and as a tenant he should continue paying the rent. But he had failed to pay the rent for the month of August and September 2006 to the tune of Shs.690,000/= and on that ground the interim orders should not be extended any more. The plaintiff must do equity to enjoy equitable relief. He further submitted that the ex parte injunction was granted on two conditions namely that the plaintiff should continue paying the rent and filing of an undertaking for damages by 31st July 2006 and to date the plaintiff has not complied with those orders.

Mr. Ahmednasir in reply submitted that the plaintiff had complied with the conditions imposed by the court. An undertaking was filed on 31st July 2006 and stamped and he was not aware that rent has not been paid as this is the first time he is hearing that rent has not been paid but there is no evidence from the Landlord to state that rent has not been paid for those two months.

Mr. Ahmednasir further submitted that if the defendant was dissatisfied with the ex parte injunction then he ought to have invoked the provisions of Order 39 of the Civil Procedure Rule which provide thus:

Order 39

“Rule 3:

(1) where the court is satisfied for reason to be recorded that the object of granting the injunction would be defeated by delay, it may hear the application ex parte.

(2) An ex parte injunction may be granted only once for not more than 14 days and shall not be extended thereafter.

(3) In any case where the court grants an ex parte injunction the applicant shall within 3 days from the date of the order serve the order, the application and the pleading on the party sought to be restrained.

Rule 4:

Any order for an injunction may be discharged or set aside by the court on application made thereto by any party dissatisfied with such order."

The injunction being challenged were issued ex parte. It is perfectly well settled that a person who makes an ex parte application to the court – that is to say in the absence of the person who will be affected by that which the court is asked to do is under an obligation to the court to make the fullest possible disclosure of all the material facts within his knowledge and if he does not make the fullest possible disclosure, then he cannot obtain advantage from the proceedings and he will be deprived of any advantage he may have already obtained by him.

The application by the plaintiff came before Visram J, who after careful consideration of the matter came to the conclusion that the plaintiff had established a prima facie case with a high probability of

success. Consequently the learned Judge granted the prayers sought by the plaintiff. I agree with Mr. Ahmednasir that ex parte interim orders can only be discharged or set aside on application under 39 Rule 4 of the Civil Procedure Rules and supported by an affidavit sworn by the defendant. What Mr. Machira has done is to state facts from the bar. Issues for adjudication ought to be raised through pleadings.

The Court of Appeal in the case of *CHARLES C. SANDE VS. KENYA CO-OPERATIVE CREAMERIES LTD – CIVIL APPEAL NO. 154 OF 1992* held that a Judge has no power or jurisdiction to decide an issue not raised before him and went to observe that:

"In our view the only way to raise issues before a Judge is through the pleading and as far as we are aware that has always been the legal position We would endorse the well established view that a Judge has no power to decide an issue not raised before him but having said so, we must revert to the question of how or the manner in which issues are to be raised before a Judge is through pleadings and as far as we are aware that has always been the legal position."

As stated in *BULLEN AND LEAKE* 12th Edition at page 3 under the rubric *NATURE OF PLEADINGS*:

"The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the twofold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial."

In view of the foregoing this application by the defendant cannot succeed as the issues for adjudication ought to have been raised through an application as provided under the provisions of Order 39 Rule 4 of the Civil Procedure Rules.

For the reasons above the plaintiffs' application succeeds and the same is allowed.

Consequently the interim orders granted on 27th July 2006 are extended and to remain in force until 18th October 2006 when the two Chamber Summons dated 27th July 2006 and 30th August 2006 will be heard inter partes.

Costs be costs in the suit.

Dated and delivered at Nairobi this 13th day of October 2006.

J.L.A. OSIEMO

JUDGE