REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

Civil Appeal 12 of 2000

DAVID MBUGUA T/a FLASH COMMERCIAL AGENCIES.....APPELLANT

VERSUS

PINKAM HOLDING LTD……1ST RESPONDENT

PHILLIP NJOKA KAMAU…….2ND RESPONDENT

JUDGMENT

The appellant, David Mbugua Mburu t/a Flash Commercial Agencies filed suit in the Chief Magistrate's Court Nakuru seeking for several declaratory orders against the respondents, Pinkam Holding Ltd and Phillip Njoka whom he claimed had wrongfully, illegally and maliciously evicted him from the premises known as **Room No. 24D, 1st Floor Pinkam House Nakuru** situated **in L.R. No. 608 Section 56**. The appellant further sought damages to be paid him by the respondents on account of the said illegal eviction and detention of his goods by the respondent. The appellant's suit was premised on the fact that he was a protected tenant under the provisions of the **Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301 of the Laws of Kenya** and therefore his tenancy could not have been terminated other than as provided by the law. The respondents filed a defence denying the appellants claim. The respondents stated that the appellant was no longer a tenant of the respondent at the time the said suit was filed in the lower court. The respondent further counterclaimed for the sum of Kshs 9,936/= which the claimed to be the rent arrears owed by the appellant.

At the time of filing the suit, the appellant also filed an application under the provisions of **Order XXXIX rules 1, 2, 3 & 9 of the Civil Procedure Rules** seeking to restrain the respondents by means of a temporary injunction from locking, hindering access to or in any other way interfering with the appellants quiet and peaceful occupation, use and enjoyment of his office premises situated in the said suit premises. The application was supported by the annexed affidavit of the appellant. The application for injunction was opposed by the respondents. The 2nd respondent filed a replying affidavit stating that the appellant was no longer a tenant in the respondent's premises. He deponed that he had acted within the law when he shut the premises leased to the appellant after the appellant had failed to pay the rent due. He further deponed that after the tenancy of the appellant was terminated, a new tenant had taken the occupation of the said suit premises. The Resident Magistrate heard the said application after which she delivered a ruling dismissing the said application for injunction. Being aggrieved by the said dismissal, of his application, the appellant filed an appeal to this court.

In his memorandum of appeal, the appellant raised six grounds of appeal faulting the decision of the trial magistrate in dismissing the said application. The said grounds of appeal may be summarized as follows:- The appellant was aggrieved that his application for injunction had been dismissed whereas he had adduced sufficient evidence to enable the trial court grant the same. The appellant was further

aggrieved that the trial magistrate had totally ignored his pleadings in arriving at the said decision dismissing his application. The appellant faulted the trial magistrate for placing reliance on immaterial facts which were not pleaded to reach her decision dismissing the application. The appellant urged the court to allow the appeal and set aside the said ruling and substitute it with a judgment of this court allowing the said application for injunction.

At the hearing of the appeal, this court allowed the appellant to proceed with the hearing of the appeal ex-parte after being satisfied that the respondent, who had been served, had failed to attend court without any sufficient or satisfactory reason. In his submission before court, Mr Karanja, Learned Counsel for the appellant argued that the respondent had seized the appellant's tools of trade and evicted the appellant from the suit premises inspite of the fact that the appellant was a protected tenant under the provisions of the **Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap 301 of the Laws of Kenya**. Learned Counsel submitted that the respondent seized the said goods without any lawful authority or an order of the court. He further submitted that the appellant had been evicted from the said premises and his tenancy terminated contrary to the provisions of **Cap 301 Laws of Kenya**. He argued that the fact that the appellant may have owed rent at the time, was no justification for the respondents to take the law into their hands and seize his goods and terminate his tenancy in the said premises.

He further submitted that the trial magistrate relied on documents which were irregularly admitted in evidence as the same did not form part of the pleadings which had been filed by the parties to the suit. Learned Counsel for the appellant further argued that for the reasons stated, the plaintiff had established a prima facie case and therefore the trial magistrate ought to have granted the orders of injunction sought. The appellant was aggrieved that his application for injunction was disallowed by the trial magistrate for no apparent reason. He urged this court to consider his appeal to have merit and allow it by setting aside the dismissal order and substituting it with an order of this court allowing the application for injunction.

This is a first appeal. As the first appellate court in civil cases, this court is mandated to reconsider and re-evaluate the evidence and the submissions made before the trial magistrate and reach its own independent determination whether or not to uphold the decision of the trial magistrate. (See **Selle –vs- Associated Motor Boat Co. Ltd & Anor [1968] E.A. 123 at page 126 para H**. In the instant appeal, the appellant is craving for the judgment of this court to overturn the decision of the trial magistrate in declining to grant the interlocutory order of injunction sought. The issue for determination by this court is whether the appellant established a case so as to entitle the trial magistrate to grant the interlocutory injunction sought.

This court must from the outset state that the grant of the orders of injunction by any court of law is a discretionary remedy. The said orders are granted at the discretion of the court of first instance hearing the application for the orders of injunction. This court cannot substitute its discretion with that of the trial magistrate, unless it is established that the trial magistrate wrongly exercised her discretion in refusing to grant the said orders of injunction sought. What are the principles to be considered by the court in making a determination whether or not to exercise its discretion in favour of granting an applicant the orders of injunction sought? In **Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society [2001]1 EA 86** at page 89, the Court of Appeal held that:

> ***"The sequence of granting an interlocutory injunction is firstly, that the appellant must show a prima facie case with a probability of success if this discretionary remedy will ensure***
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> ***in his favour; secondly, that such an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury; and thirdly when the court is in doubt, it will decide the application on the balance of convenience – See Giella –vs- Cassman Brown and Co. Ltd [1973] E.A. 358 at 360 letter E. These conditions are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed".***

In the instant appeal, the pleadings filed by the appellant was to the effect that his goods had been

unlawfully seized and the premises that he had leased from the respondents shut. The respondent admitted seizing the appellant's properties that were found in the said premises. The respondents went further and stated that by the time the appellant filed his suit, his tenancy had already been terminated and the said suit premises leased to someone else. The facts deponed by the 2nd respondent that the appellant had been removed from the said suit premises was implicitly acknowledged by the appellant when submissions were made before the trial magistrate by the counsel for the appellant.

Now the fact that the appellant's lease was lawfully or unlawfully terminated was not an issue before the trial magistrate. This was because the appellant had not sought a mandatory injunction to compel the respondents to restore him back into possession of the suit premises. The application that was before the trial magistrate was an application for interlocutory injunction by which the appellant sought to restrain the respondents from locking or preventing the appellant from accessing the suit premises for the purposes of conducting his business. Once it was established that the appellant was no longer a tenant in the said premises, the trial magistrate could not have granted the orders of interlocutory injunction sought. Though the reasons given for dismissing the said application for injunction were different, having re-evaluated the evidence placed before the trial court, this court is of the view that the trial magistrate ultimately arrived at the correct decision.

Having re-evaluated the evidence on record and the submission made before me by the appellant, I do hold that the appellant failed to establish a prima facie case so as to enable this court grant him the orders of interlocutory injunction sought. The appellant came to court after the horse had already bolted from the stables. If the appellant had made an application for mandatory injunction, maybe the results could have been different. It is unnecessary for this court to consider the other principles to be considered as laid down in the **Giella –vs- Cassman Brown Case**. Since the appellant is no longer in occupation of the suit premises, the granting of an order of interlocutory injunction would be in vain. The appellant's remedy in the circumstances of this case lies in the ventilation of the main suit in a full hearing.

In the premises therefore, and for the reasons stated hereinto before, the appeal filed by the appellant cannot succeed. The same lacks merit. It is dismissed with costs to the respondents.

DATED at NAKURU this 11th day of November 2005.

L. KIMARU

JUDGE