REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Civil Case 92 of 2003

GEORGE MURAYA KIRIRA ………………...………………...…….. PLAINTIFF

VERSUS

ZADOCK A. M. ENANE ……………………………………………DEFENDANT

RULING

The Defendant/Applicant, Zadock A. M. Enane, sought in his application dated 19.01.2005 an order that the exparte temporary injunction granted to the Plaintiff/Respondent, George Muraya Kirira, on 27th November 2003 be discharged and/or set aside. The application was premised on order XXXIX Rule 4 and Order L Rule 1 of the Civil Procedure Rules. It was supported by an affidavit sworn on 19-01-2005 by the Defendant.

In his affidavit, the Defendant averred that the plaintiff was using the exparte temporary injunction order to frustrate his intention to demolish and reconstruct the suit premises known as Kakamega Municipality/Block 1/635 situate on Hassan Were Road by failing to prosecute the Notice of Motion dated 25.11.03 in which the injunction order was made. He pointed out that the Plaintiff had withdrawn from the Business Premises Tribunal Case No.67 of 2003 filed by him and declined to file a reference in the said tribunal following a tenancy notice served on him by the Defendant qua landlord as a result of which the tenancy notice had taken effect on 1.4.2004. He submitted that the plaintiff had failed to pay rent for the suit premises since 1st October 2004.

In his replying affidavit sworn on 3.3.05 in opposition to the application, the Plaintiff averred that the failure to take a date for the hearing of the application was caused by his (Plaintiff's) advocate and that that should not be used to defeat his "cause". He contended that the Defendant wanted him out of the suit premises "*by hook or crook, by not even taking a step to have the matter listed and heard on the merits.*"

Mr. Kirenga, learned counsel for the Defendant, urged the court to discharge the injunction order made on 27.11.2003 and relied on the Defendant/Applicant's supporting affidavit. He emphasized that the application in which the injunction was made had been brought under a certificate of urgency but had never been heard inter parties as the urgency seems to have ceased after the orders were procured. He submitted that there was now arrears of rent amounting to Shs.120,000/= as the Plaintiff no longer paid rent. If the orders were not lifted, the Defendant would continue to suffer oppression by the Plaintiff. He invited the attention of the court to the following authorities to buttress, he said, his case.

1. *C.A. Appeal No. 14 of 1999 at Kisumu (Daniel Shumari v. Naliaka Maroro)*
2. *Reef Building Systems Ltd. v. NBI. City Council – NBI. H.C.C.C.NO.1357 of 2001 (Mlimani)*

After Mr. Kirenga's submission, Mr. Ondiek, learned counsel for the Plaintiff, sought adjournment to enable him to digest the authorities cited by Mr. Kirenga and to prepare his reply. The court agreed to adjourn the matter to a date to be fixed by the parties in the court registry. On 7-6-05, both counsel took a date by consent for the further hearing of the application on 19.07.05 when Mr. Kirenga turned up in court but Mr. Ondiek did not. The daily cause-list was heavy on that day and Mr. Kirenga waited up to 5

p.m. when the case was reached. Mr. Kirenga urged the court to proceed with the hearing which it did. Being absent, Mr. Ondiek offered no submissions, and the court proceeded to give a date for the ruling on 3.11.05. This is the Ruling.

Although Mr. Ondiek did not make any submissions, his client, the Plaintiff, had filed a replying affidavit and therefore the application was opposed. I have duly considered the application and the replying affidavit and the submissions of the counsel, Mr. Kirenga.

Under Rule 4 of Order XXXIX of the Civil Procedure Rules "*any order for injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order.*" Under this rule, the court has unfettered discretion to discharge or vary or even set aside an injunction order if the ends of justice so demand, or if it does not serve the ends of justice. It must be borne in mind that an injunction order is a discretionary remedy issued to protect legal and equitable rights and where it is issued at an interlocutory stage, it is meant to preserve the subject matter or to maintain the status quo. If it is shown that there has been changed circumstances that would render its maintenance unjust, oppressive, or antithetical to the ends of justice, the court would discharge it or vary it as the circumstances of the case demand.

The temporary injunction in this case was made on 27.11.2003. Inter-parties hearing of the application dated 25.11.03 was fixed on 17.12.03 when both counsel attended court and agreed to argue it the following day (i.e. on 18.12.2003). For reasons recorded on 18.12.03, the court *suo moto* took out the hearing on 18.12.03 and fixed it on 27.1.04 for mention after making interlocutory orders pursuant to section 63(e) of the Civil Procedure Act Cap 21, similar in terms to the interlocutory injunction which was bound to elapse on that day. This was intended to preserve the status quo.

On 27.1.04, both counsel attended court and recorded a consent for the inter-parties hearing to take place on 8.3.2004. On 8.3.2004, Mr. Kirenga, counsel for the Defendant/Respondent, sought leave to argue a Preliminary Objection dated 8.12.2003. The court heard both counsel on it and delivered its ruling on 16/6/04.

Has the Defendant/Applicant made out a case for discharge or variation of the exparte injunction order made on 27.11.03? It is ostensible that the Plaintiff has taken his sweet time to prosecute the application dated 25.11.03. But the filing by the Defendant of the subject application dated 19.1.05 has not exactly helped to speed up the prosecution of the application (dated 25.11.03) any more than the said Preliminary Objection had. On the contrary, both served to delay it. The Defendant alleges that the Plaintiff has failed to fix for hearing the application dated 25.11.03. But the right to fix it for hearing is not exclusively reserved to the Plaintiff. The Plaintiff was enjoined no less than the Defendant to take a date for the inter parties hearing of the application. Both failed to do so. Where, as here, both parties are entitled to take a hearing date, it is idle for one to blame the other for the delay in taking a hearing date.

The burden reposed on the Defendant to show that the Plaintiff had procrastinated and unduly delayed the hearing of the application or that there are changed circumstances that rendered the maintenance of the injunction unjust, oppressive or against the interest of justice. I do not see on the material before me any changed circumstances on which it can be said the maintenance of the injunction would be unjust, oppressive, or would not serve the ends of justice. What one observes is that the Defendant qua landlord would suffer if during the maintenance of the injunction, the plaintiff pays no rent for the premises. Perhaps this is all the more reason why the Defendant should have been stirred up to take a date for the inter-parties hearing of the application without having to wait for the Plaintiff to do so. I observe that the Defendant has in his defence not counter-claimed for rent although he avers that rent is in arrears. It is my finding that both parties are *pari delicto* in so far as the delay is concerned in the fixing for hearing inter-parties the application dated 25.11.03.

To forestall further delay in the prosecution of the said application, I direct that the same be heard inter-parties on 14-12-2005.

Dated at Kakamega this 3rd day of November, 2005

G. B. M. KARIUKI

<u>J U D G E</u>