



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA  
CIVIL SUIT NO. 241 OF 2003**

**JAMES MATHEKA ..... 1ST  
PLAINTIFF**

**NOEL NJERI MATHEKA t/d**

**GARDEN OF EDEN PARLOUR ..... 2ND  
PLAINTIFF**

**VERSUS**

**BAOB FARM LIMITED t/d**

**WHISTLING PINE RESTAURANT .....  
DEFENDANT**

**Coram: Before Hon. Justice Mwera**

**Mr. Tindika for Plaintiffs/applicants.**

**Mr. Kingi for Defendant/Respondent**

**RULING**

For reasons not clearly stated the plaintiffs' two applications were set down for hearing on 12-2-04 . There did not appear to be elements of commonality for that fixing for hearing. And no doubt the defendant raised preliminary points of objection which the court heard before going to the substance of the said 2 applications.

The first application was by way of notice of motion dated 17.11.03. It was brought under O 41 r.4 Civil Procedure Rules and S.3A Civil Procedure Act for the principal prayer that:

“2. There be a stay of execution and or stay of the orders of this Hon. Court granted on 12th November 2003 dismissing the Plaintiffs/Applicants application dated 3rd October 2003 and disc harging the interim orders and the status quo obtaining as at the 12 th November 2003 before the ruling herein was delivered be maintained pending the hearing and determination of the appeal herein.”

One of the grounds in the body of this application which was supported by the affidavit of one Noel Njeri Matheka the 2nd plaintiff, stated that the plaintiffs were dissatisfied with the said ruling of 12-11-03 and had moved to lodge an appeal.

The plaintiffs later on 10-2-04 lodged a chamber summons brought under 0 39 rr. 1, 2, 9 and S.3A with

the main prayer:

*2. That this Honourable Court be pleased to issue an injunction restraining the defendant ----- from alienating, disposing off, terminating the plaintiff's tenancy, withdrawing furniture, fixtures - ---- interfering with the supply of utilities --- or otherwise interfering with the ----- management of WHISTLING PINE RESTAURANT pending the hearing and determination of the appeal herein."*

It was again stated in the grounds plus deposition of the self-same Noel Njeri Matheka that because the plaintiffs were dissatisfied with the ruling of 12-11-03 dismissing their injunction (application (dated 3.10.03), they therefore desired to have a temporary injunction pending the final disposal of the (intended) appeal against the said dismissal orders.

Mr. Kingi's notice of preliminary objection against this application was four-pronged: that the said application dated 10-2- 04 was res judicata; that this court had no jurisdiction to entertain it; that that application offended the rules of procedure and that it was an abuse of the court process.

In the light of the position that while arguing and determining a preliminary objection, the pleadings and other facts in the cause are deemed accepted as they are so very little or nothing at all should be said of the same. [see **MUKISA BISCUIT MANUFACTURING CO. LTD. VS. WEST END DISTRIBUTORS LTD. (1969( EA 696)**]

The court heard that the application of 3-10-03 for a temporary injunction was dismissed. Yet the plaintiff is returning to court again seeking an injunction under the same provisions of law and the same orders.

To this Mr. Tindika responded that while the earlier application sought injunction until a case before the Business Premises Tribunal was determined, the present one was to be operational until the intended appeal (against the dismissal orders of 12-11-03) was determined. That indeed in the present application the grounds were that even since the ruling of 12.11.03 the defendants' had began to remove furniture from the suit premises as well as demanding that the plaintiffs make cash deposits for water and electricity – all contrary to the letter of tenancy dated 31-07-03. To be precise the main ground for the injunction application dated 10-2-04 is to hold the status quo until the appeal lodged or intended to be lodged against the ruling of 12- 11-03 is determined. The removing of furniture and demands for deposits is simply to season the application.

Mr. Kingi continued that this court lacked jurisdiction to entertain the present injunction application in the light of the fact that an earlier one was dismissed. Besides the constitutional provision of law that this court wields unlimited original jurisdiction in matters civil or criminal, it is also satisfied that where it has refused an interlocutory injunction, it can still consider and grant the unsuccessful party an injunction even as that party goes on appeal over the refusal (see **MADHUPAPER INTERNATIONAL LTD VS. KERR [1985]KLR 840**) to ensure that the subject matter is preserved and in case the appeal is successful, it should not be rendered nugatory.

Mr. Kingi however added another ground to the effect that the plaintiff were guilty of abuse of the process of the court; they had filed the two applications (that of 17-11-03 and 10-2-04) seeking basically the same orders with no justification at all. That they should have one or the other and not both at the same time. That indeed there was in force an interim order of stay (granted ex parte, quite probably) after the filing of the application dated 17- 11-03. So the defendant did not see the need to ask for the same orders as those already being enjoyed.

On this plane, this court must agree with the defendant. The plaintiffs should not file a multiplicity of applications especially when their substantive and end result is one. The notice of motion sought stay against the dismissal orders of 12-11-03 until the plaintiffs appeal was finally determined. The chamber summons being attacked by this preliminary objection seeks the same orders. Indeed the plaintiffs are already enjoying the interim orders of stay. So what was the purpose of filing the injunction application of

10-2-04? Parties come to court when aggrieved or in pursuit of relief. It is not that to seek the relief a party shall file every kind of application, in the same court hoping to fall by luck either here or there as if courts play a game of chance. That clogs up the court process and no doubt confuses and even harrasses the opponent.

The plaintiffs already enjoying stay orders should not be allowed to file and argue this injunction application at the same time, particularly that it also seeks orders as those already being enjoyed.

On this basis the preliminary objection is upheld and the application dated 10-2-04 is dismissed with costs. The parties may fix the hearing of the stay application dated 17-11-03 for hearing and disposal.

Order accordingly.

**Delivered on 26th February 2004.**

**J.W. MWERA**

**JUDGE**