



**IN THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO.528 OF 2002**

**GITHII COMMERCIAL AGENCIS LTD. :::::::::::PLAINTIFF**

**V E R S U S**

**MADATALI CHATUR :::::::::::DEFENDANT**

**R U L I N G**

This is an application by chamber summons dated 22/3/2002 made under Order 39 Rules 2&3 of the Civil Procedure Rules and S.3A of the Act for an injunction order against the defendant requiring the same to be restrained from attaching plaintiffs goods at their rented property at LR NO.209/097/4. Secondly that amount of rent due being KShs.754,000/= expended by the plaintiff in renovating the premises be offset against the due rent, and thirdly an order to stop eviction or interference with plaintiff's occupation in any way. There is also an ALTERNATIVE prayer to compel defendants to ensure that all water, electricity and drainage systems are connected to the rented premises and are operational. There was a Second alternative prayer that the sum of KSh. 754,000 expended by the applicants in the overhaul of the building structures be offset against the rent due.

The supporting affidavit by WINSTON THANDI sworn on 22/3/2002 complains that the plaintiff became a tenant of the defendant as a result of a tenancy agreement entered into on 31/8/2000 to use the same as a Bar, Lodge and Restaurant, that without knowing it before the building needed serious repairs and had no electricity or water and he had to effect extensive repairs and paid money for reconnection of power. This all amounted to KShs.750,000/= which he wants the defendant to reimburse. He also complained against harassment. But in reply the defendant through affidavit of the Manager Masinde Simiyu sworn on 3/4/2002 denies harassing the plaintiff and says that the letting was through a tenancy agreement dated 30/8/2000 and that it was the term of that agreement that the plaintiff would before executing that agreement visit the premises and ascertain that there were no defects and that the premises were in good and tenantable repair nor would the plaintiff carry out any repair work without informing landlord in writing. More he disclaims the receipts rendered as not being genuine and says that the principles for awarding interlocutory injunction was not met.

The complaints in this application are based on a contract of tenancy in that there is a breach of what the tenancy provides.

The tenant applicant and the landlord both accept that there was a written agreement. The agreement was not a formal lease but was to operate in the place of one. Paragraph 7 of the said letter of offer provides that:-

“The tenant confirms that it has examined the premises and further confirms that they are in good and tenantable repair and in tenantable condition”.

Mr. Kwame, Counsel for the landlord submits that after the tenant had taken up possession he is deemed to have satisfied himself and is estopped from claiming that some structural repairs were needed after they had inspected the property but say they did not know that drainage system was blocked. NO water supply, and electricity bill was outstanding, but it becomes a question of fact whether these were hidden defects that a diligent search could not have revealed. To me they were not so hidden that any superficial inspection could not have revealed. Should he be estopped from claiming?

Estoppel is a rule of evidence whereby a party is not in certain occasions as in this one , allowed to allege or prove a fact where the matter had been decided/or accepted deliberately by him to be the fact. This is so even if the fact is not true in reality. The other claim is for rent that was due. The tenant admits that what is due is KShs.200,000/= and not KShs.500,000/= and sets off this against the repairs effected by him being what the tenant considered to be essential repairs but again the landlord says any such repairs ought to have been effected subsequent to a written authority from him. Alternatively the receipts presented for the repairs do not relate to the premises in question and are not signed. They do not show who purchased goods and from where. Others are merely petty cash vouchers. There cannot be any responsibility attaching on them.

I have looked at these claims and the prayer here is for both prohibitive and mandatory injunctions. I was not addressed on the alternative prayer for mandatory injunction though but it is pertinent to lay out the principles for mandatory injunction to issue, applicant must appreciate that although interlocutory order of mandatory injunction can be given by this court using inherent jurisdiction, it is a very rare order and court does so very sparingly and almost with conscious reluctance because it is a very drastic order and compels the doing of what has already been done.

The Rules set out by Spry ag. J. A in GIELLA VS CASSMAN BROWN CO. LTD (1973) EA 358 applies to both two injunctions.

These precepts apply in an award for interlocutory prohibitive injunction and it is stated that it is a discretionary order and the court can award it only where applicant shows a prima facie case with probability of success, but will NOT normally be granted unless the applicant will otherwise suffer irreparable injury which cannot be compensated by award of damages and when the court is in doubt to decide the application on the balance of convenience.

I have looked at this matter and I do not see that the plaintiff has raised a prima facie case with probability of success. The rent owing is a fact admitted by both sides although amount due may be an issue the right of the landlord to levy distress is a statutory right and is furthermore reserved in the agreement in the tenancy agreement (Letter of offer). I do not see that the tenant applicant has any right now that is about to be violated which requires protection by injunction.

If I am wrong in this, I think whichever loss he might have suffered in effecting repairs can adequately be compensated by the defendant if he prays them and gets an order of court.

Otherwise the application is dismissed with costs.

Dated this 12th day of April 2002

**A. I. HAYANGA**

**JUDGE**

Read to Mr. Kwame for respondent

Mr. Namada for applicant