

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO.227 OF 2001

Intimate Beauty Care Ltd t/a Simply fine Fashions.....APPLICANT

VERSUS

Kundan Singh Construction Ltd t/a Leopard Beach Hotel.....RESPONDENT

RULING

The application before this court for determination is dated 10.5.2001.

It was brought by the Plaintiffs who sought for the following reliefs:

2) That a temporary mandatory injunction do issue directing the defendants, at its own costs to forthwith restore to the hotel premises all plaintiff's stock, goods and other items now lying at Diani Police Station, pending hearing and determination of this suit.

3) That an injunction do issue to restrain the defendant by itself, its servants, workmen or agents as otherwise howsoever from relocating the plaintiff's boutique shop and hairdressing saloon from its location as at 30 th April, 2001 when it was handed over to the defendant for renovations without compliance of lawful procedures.

4) That costs of this application be provided.

A further prayer has been overtaken by events need not be of concern to us presently.

The application was supported by an affidavit of one Caroline Gommans and based upon several grounds thereon stated. The facts upon which the application was brought are that the Applicant/Plaintiff was a

protected tenant on the Defendant's plot known as Diani Beach Block 546. The Plaintiff at all material time had paid its rents as agreed between the parties. That the Defendant who wished to renovate the whole hotel on 30.4.2001 agreed with the Plaintiff to move the Plaintiff from the rented premises temporarily to Room No.104 at the hotel for the purpose of storing its merchandise, stock and other goods in the Plaintiff's rented premises. That come the 5.5.2001, the Defendant, without lawful reason and contrary to their recent agreement forcefully evicted the Plaintiff not only from Room 104 but also from the rented business premises at the hotel. The defendant in the unlawful process carried away all the Plaintiff's goods aforesaid from Room 104 which had been opened by the Plaintiff upon the Defendant's allegation that it was leaking and that the goods therein therefore needed, for their preservation, to be taken to another room at the hotel. It is further alleged that the group of Defendant's servants who removed the Applicant's goods from Room 104 after tricking the Applicant to open, alleged that they had a warrant from the court authorizing them to remove the Applicant's goods and merchandise. The Applicant annexed an order of the Resident Magistrate's court which is marked as Exhibit CG 41 in the supporting affidavit. The order, argued the applicant was obtained ex parte and that it

authorized no-one to carry out any eviction nor had it been served upon the Applicant by the time eviction was done. The Applicant further deposed in his affidavit that although it reported to the Police at Diani, no protection was given by the police, at least until the matters could be sorted out by the courts. Several persons who were used to throw the applicant merchandise out of the Hotel premises were later arrested by the Police on the report of the Applicant but none of them was charged for any offence. The Plaintiff/Applicant further deposes that the Respondents/Defendant's

conduct in this matter, was not only in open and total disregard of the law but was also primitive and barbaric and that unless restrained and rectified by this court appropriately, it will not only cause unmitigated loss and damage but that it will bring law into disrepute and will cause others like the Defendant to take law into their own hands to the detriment of the members of the public, who will see no purpose in obeying the law in the conduct of affairs. The Applicant finally undertakes to pay compensation for any damages and loss that may be caused by an issuance of any mandatory or prohibitive injunctions in case the Applicant's case does not succeed eventually.

The Applicant's case therefore was that as a lawful tenant of the Respondent in Leopard Beach Hotel Block No.546, he was entitled to quiet enjoyment of its tenancy and that if he at any stage failed to pay any rent or breached any term of the tenancy, it would only be dealt with in accordance with the terms of the Lease Agreement and strictly in accordance with the laws of this country. He then argued that since the Respondent deliberately disregarded the terms of the tenancy and that using trickery and force, unlawfully dispossessed the Applicant of the tenancy premises, it should not be allowed to escape the arising legal consequences of its acts, which consequences should include the return of the tenancy premises to it plus all the goods and merchandise that were forcefully removed from the tenancy premises plus the loss and damages that resulted from the unlawful conduct of the Respondent.

It is in the record that the Respondent/Defendant filed no replying affidavit. It is further on the record that it only filed grounds of opposition to this application, which filing was out of the time prescribed by law. It is also now not in dispute that although the Respondent was against all odds

and upon the favourable discretion of this court allowed to file any such replying affidavit or grounds of opposition, though upon terms or conditions, it effectively failed to do so. This means therefore, that the Applicant/Plaintiff's application under consideration, is effectively unopposed.

As stated at the beginning of the application the Applicant seeks for both a mandatory injunction and a prohibitive injunction. I will first consider whether the Applicant is entitled to a mandatory injunction.

I have considered the arguments put forward for the Applicant/Plaintiff by Mr. Mogaka, as supported also by the materials deposed in the supporting affidavit. Applicant's case is that the Respondent unlawfully and using trickery and deceit made the Applicant agree to relocate from the suit premises let to him by the Respondent, to Room No.104 in the said Leopard Beach Hotel on the pretext that the hotel was due for renovation. Later it is said the Respondent alleged that the Applicant's goods and merchandise was being rain-leaked upon and that they needed to be re-located once again. It said that when the Applicant unlocked the room No.104 where the goods were, the Respondent's hired personnel who included delicensed auctioneers and other ruthless hirelings, forcefully and

unlawfully removed and threw out all the Applicant's goods as detailed in the amended plaint. As earlier indicated, the Applicant depositions stand uncontroverted. This court accepts the facts as asserted by the Applicants.

I accordingly hold that the Applicant has proven a prima facie case with high chances of success. It is my view also and I so hold that the Applicant is likely to suffer irreparable loss and/or damages. It would therefore be entitled to a prohibitive injunction as prayed in the 2nd prayer under Order 39 Rules 1, 2 & 3 of the Civil Procedure Rules.

The only other question which this court has to answer is whether the Applicant would also be entitled to a mandatory injunction as prayed. Upon the uncontroverted facts on the record the Respondent/Defendant unlawfully and using trickery and force, threw the Applicant out of his rented premises.

He took the law into his own hands and in open disregard of it decided to effect its unlawful intention of dispossessing the Applicant of the premises itself without following the legally prescribed procedure. The Applicant, accordingly, found it imperative to rush to this court to seek for help in terms of an order which should compel the Respondent to do some act necessary to restore the Applicant to its position before the Respondent committed the misdeed complained of. It is now trite law that although this court is not empowered under Order 39 of the Civil Procedure Rules, to come to the Applicant's rescue to issue a mandatory injunction, it can nevertheless do so under its inherent powers donated under Section 3A of the Civil Procedure Act, provided the Applicant sought the court's assistance with reasonable promptitude, as I hold, the Applicant herein, did. I am conscious of the principle that mandatory injunctions are only granted in exceptionally and in the clearest of cases but I am also satisfied that the relief can be granted in suitable cases, even at the interlocutory stage. I wish to add that if the relief of the mandatory injunction should issue, its purpose will be to force the Respondent to restore the Applicant to the status quo ante: that is to say, to the position which the Applicant occupied before the Respondent misconducted himself against the Applicant. In this regard it has been held, and I so support the position held, that it will not matter whether or not the Respondent has taken further steps to make it difficult to revert to the status quo ante. For example it may not matter that in a case of removing an Applicant wrongfully from the leased premises such as this one is, the

Respondent has further let the same to a third party who has since taken possession. The effect of a mandatory injunction shall be to restore the subject premises back to the Applicant even where the same will adversely affect a third possibly innocent party. As also decided in the case of *LOCABAIL INTERNATIONAL FINANCE vs AGRO-EXPORT*, [1986] 1 AER 901, by Mustill L.J., and fully approved by the Court of Appeal in the case of *KAMAU MUCUHA vs THE RIPPLES LTD*, Civil Application No.186 of 1992 a mandatory injunction would, in a suitable case, be issued despite the fact that its effect is to grant a major part of the relief sought in the main claim, so long as the court will do so with caution.

Having considered the above principles carefully, I am satisfied that the facts of this case are suitable facts upon which this court should also grant a mandatory injunction as prayed by the Applicant.

The upshot therefore is that the Applicant's application for both temporary mandatory injunction and prohibitive injunction are hereby granted as prayed with costs.

It is so ordered.

Dated and delivered at Mombasa this 27th day of July, 2002.

D. A. ONYANCHA

J U D G E

Delivered in the presence of:-

Mr. Omwenga - for Applicant/Plaintiff

Mr. Gikandi - for Respondent/Defendant