



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELCA NO. 49 OF 2019**

**JOSHUA MUSYOKA WAMBUA.....APPLICANT**

**VERSUS**

**KAMBI MWACHUYU.....DEFENDANT**

**RULING**

1. By a Notice of Motion dated 8<sup>th</sup> November, 2019, brought under Order 40 Rule 7 of the Civil Procedure Rules, Section 3, 3A and 63 ( e) of the Civil Procedure Act and Article 40 and 47 of the Constitution of Kenya 2010, the Appellant/Applicant is seeking for orders: -

**1. Spent**

**2. Spent**

**3. That the Honourable Court be pleased to issue a temporary injunction orders restraining the respondent, his agents or anybody authorized by the respondent from entering, evicting or taking into possession of the premises known as JODAM CAFE situated in Mtwapa being rented by the tenant/appellant from the landlord/respondent pending the hearing and determination of this appeal.**

**4. That the costs of this application be provided for.**

2. The application is based on the grounds on the face of the motion and supported by the affidavit of Joshua Musyoka Wambua, the applicant sworn on 8<sup>th</sup> November, 2019. The applicant's case is that in or about 2014, he entered into an oral agreement with the respondent to lease the suit premises at a monthly rent of Kshs.8000/= which the applicant states he has paid to date. He states that they orally agreed that the applicant should renovate the suit premises which the applicant carried out. The applicant has deposed that at the beginning of the year 2019, he had health challenges which made it difficult for him to run the hotel business, hence sublet the premises to one Esha Abdalla Odhiambo as a running concern for one year. That the subtenant took over all the items in the premises and proceeded with the hotel business and was to pay for the hired items together with the monthly rent of Kshs.8000/= which was remitted to the respondent.

3. The applicant states that in June, 2019, the subtenant closed the suit premises and stopped paying rent and on enquiry, the applicant discovered that the respondent had entered into a tenancy agreement with the subtenant. That in August 2019, the applicant was served with notice to terminate or alter terms of tenant by the landlord. The applicant states that he made a reference to the tribunal and on 25<sup>th</sup> October, 2019 the respondent served the applicant with an application seeking orders to strike out the reference. That the applicant responded to the said application by filing his replying affidavit on 30<sup>th</sup> October, 2019. He states that they agreed that the tribunal relies on the pleadings to make a ruling. The applicant further states that on 7<sup>th</sup> November, 2019 he received an order dated 4<sup>th</sup> November 2019 from the tribunal which orders struck out the reference and authorized the respondent to take over the suit premises forthwith. The applicant states that the order of the tribunal did not make reference to the huge investment made by the applicant in the premises as per Section 12 (g) of Cap 301 Laws of Kenya. The applicant avers that if the respondent takes over possession of the suit premises, he stands to suffer loss and damage since he has not recovered his investment in the premises. The applicant urged the court to grant the orders sought herein.

4. The application is opposed by the respondent through a replying affidavit sworn on 27<sup>th</sup> November, 2019. The respondent has deposed that the applicant used to be his tenant but sublet the suit premises to one Esha Abdalla Adhiambo at kshs.50,000/= per month without the respondent's consent prompting the respondent to give him notice terminating the tenancy and the respondent filed a reference in the Business Premises Rent Tribunal (BPRT) No. 221 of 2019. That upon an application by the respondent, the tribunal struck out the reference and authorized the respondent to take over the premises. That when the respondent went to take over the premises as ordered by the tribunal, the applicant turned violent and chased the respondent away, vowing to frustrate the respondent from taking over possession of the premises. The respondent contends that the litigation by the applicant is made in bad faith. The respondent denies the contents of paragraph 4 of the

supporting affidavit, adding that the issues raised therein were not before the tribunal and cannot be raised at the appeal stage at all. The respondent states that the subtenant entered into a lease agreement with him upon learning that the applicant had misled her by posing as the owner of the suit premises.

5. Relying on advise, the respondent avers that the orders sought cannot be granted because the applicant has not established a prima facie case with probability of success; that the subject matter is known/ascertainable and quantifiable hence damages are an adequate remedy and that the balance of convenience tilts in favour of the respondent. The respondent accuses the applicant of coming to equity with unclean hands, adding that the appeal is a sham with no chances of success and neither can it be rendered nugatory. The respondent avers that in all these litigation, he is suffering a lot as the suit premises are closed and the respondent is not earning any income from it and therefore suffering substantial and irreparable loss. The respondent states that in the circumstances of this case and in the interest of justice and fair play, this application should be dismissed

6. The application was prosecuted by way of written submission which were duly filed by the advocates for the parties. Counsel for the applicant filed his submissions on 14<sup>th</sup> January, 2020 while that of the respondent filed on 22<sup>nd</sup> January, 2020.

7. I have carefully considered the arguments advanced by both parties in this case. I find that the issue for determination by this court is whether the applicant herein should be granted an order of injunction to restrain the respondent from entering, evicting or taking into possession of the premises known as JODAM CAFÉ situated in Mtwapa pending the hearing and determination of the appeal herein. The application is stated to be brought under order 40 rule 7 of the Civil Procedure Rules, Section 3, 3A and 63 (e) as well as Articles 40 and 47 of the Constitution. My take however, is that since this matter is on appeal, the most appropriate order under which the application should have been brought is Order 42 Rule 6 (6) of the Civil Procedure Rules which states thus:

**“(Order 42, rule 6) stay in case of appeal**

**(6) notwithstanding anything contained in sub-rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with. ”**

8. I also find that under Article 159 (2) (d) of the constitution, this court is mandated to consider the merits of this application and deliver substantive justice to the parties irrespective of the procedural technicality of not citing the appropriate provision of the law. In any event, Section 3, 3A and 63 (e) of the Civil Procedure Act under which the application was also expressed to have been filed, also grants this court a wide discretion to grant interlocutory orders as may appear to be just and convenient.

9. The orders sought in this application is an injunction to restrain the respondent from taking possession of the suit premises, the applicant’s reference having been struck out by the tribunal. In the celebrated case of Giella –v- Cassman Brown & Co. Ltd (1973) EA 358, it was stated that in an application for prohibitory injunction, the applicant must establish the existence of a prima facie case with high chances of success, and that he will suffer irreparable loss/damage which cannot be adequately compensated by an award of damages, and further that the balance of convenience tilts in his favour.

10. In the instant case, the applicant states that unless the orders sought are allowed, he would suffer irreparable loss and damage because of the huge expenditure incurred in carrying out renovations of the suit premises. In this case, I am not convinced that the applicant has established a prima facie case with a probability of success. Further, I am not satisfied that the applicant will suffer substantial loss which cannot be compensated in damages. Already the applicant has himself itemized the expenses allegedly incurred in renovating the suit premises and that in itself is an admission that the damages (if any) are quantifiable. Therefore the applicant won’t suffer irreparable loss or injury if the application for temporary injunction is not granted.

11. For the foregoing reasons, I find that the Notice of Motion dated 8<sup>th</sup> November 2019 as lacking in merit and hereby dismiss it with costs to the respondent.

12. Orders accordingly.

**DATED, SIGNED and DELIVERED at MOMBASA this 16<sup>th</sup> day of July 2020**

**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Yumna Court Assistant

**C.K. YANO**

**JUDGE**