



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 211 OF 2012

DAVIS MWALIMO MWANGEKA PLAINTIFF

V E R S U S

KENYA PORTS AUTHORITY1ST DEFENDANT

CEMTEC ENGINEERING LIMITED2ND DEFENDANT

RULING

BACKGROUND

1. **DAVID MWALIMO MWANGEKA**, the Plaintiff filed this case on 26th November 2012 alleging that **KENYA PORTS AUTHORITY**, the 1st Defendant, and **CEMTEC ENGINEERING LTD**, the 2nd Defendant were interfering with his occupation of Plot No. 971/972MN Shimanzi road, hereinafter referred to as 'Premises' where he was carrying out his business.
2. By his Plaintiff pleaded that he was in occupation of the premises by virtue of an agreement between him and the Port Police; that he had since 1989 been paying rent for the premises to the Provincial Police Officer which rent he had paid up to November 2012; that he had never been a tenant of the 1st Defendant; that the 1st Defendant wrote to him a letter on 21st November 2012 requiring him to vacate the premises by 1st December 2012; and that the 1st Defendant had no right to interfere with his tenancy. In his final prayer Plaintiff sought a permanent injunction to restrain the Defendants from interfering with his occupation or running of his business on the premises.

APPLICATIONS

3. While filing his Plaintiff simultaneously filed a Notice of Motion dated 26th November 2012. By that Notice of Motion Plaintiff sought the following interlocutory prayers-
 - **THAT 1st and 2nd Defendants by themselves, their servants and or agents or otherwise howsoever be restrained by temporary injunction from interfering with the Plaintiff's business on and occupation of the premises on Plot No. 971/972 MN Shimanzi Road pending**

the hearing and determination of this application.

- **THAT the 1st and 2nd Defendants by themselves, their servants and or agents or otherwise howsoever be restrained by temporary injunction from interfering with the Plaintiff's business on and occupation of the premises on Plot No. 971/972 MN Shimanzi road pending the hearing and determination of this suit.**
 - **THAT the 1st Defendant, by itself its servants and or agents or otherwise howsoever be restrained by temporary injunction from dealing with or in any way interfering with the suit property on Plot No. 971/972 MN Shimanzi Road pending the hearing and determination of this suit.**
4. The Plaintiff's affidavit in support of the application Plaintiff reiterated "That I am not and have never been a tenant of the 1st Defendant." Further that 1st Defendant had given him notice to vacate the premises by 1st December 2012.
 5. On that same day, that is 26th November 2012 the Court granted fourteen (14) days ex parte interim injunction, restraining both Defendants from interfering with Plaintiff's business or occupation of the premises.
 6. For the purpose of this Ruling I do need to say that I am operating on a reconstructed Court file and I cannot set out what the Court proceedings reflect. I am relying on copies of documents supplied by the parties.
 7. Plaintiff by another application by Notice of Motion dated 4th December 2012 sought orders that the two Defendants were in breach of the interim injunction issued on 26th November 2014. Plaintiff sought the following prayers-
 - **THAT summonses do issue to GICHIRI NDUU the Managing Director of the 1st Defendant and KENNEDY MWANGI the Managing Director of the 2nd Defendant herein to appear in Court on Day of to show cause why they should not be cited for contempt of Court for disobeying the order of injunction issued herein against the Defendants on 26th November 2012 and be committed to prison for the said contempt of court and or their property be attached.**
 - **THAT the said GICHIRI NDUU and KENNEDY MWANGI may be detained in prison for a term not exceeding six months and their property be attached for disobeying orders of this Court.**
 - **THAT the said GICHIRI NDUU and KENNEDY MWANGI be ordered to restore the suit premises to a tenable condition and make good the damaged caused thereto.**
 - **THE orders be enforced by the Officer Commanding, Central Police Station, Mombasa.**
 8. On 26th February 2014 the Plaintiff appeared in Court with yet another application a Notice of Motion of the same date. By that Notice of Motion Plaintiff sought the following prayers-
 - **That the Orders issued herein on the 26th November, 2012 be reinstated and extended pending the hearing and determination of this application.**
 - **That the status quo herein otherwise be maintained pending the hearing and determination of this suit.**
 - **That this Honourable Court be pleased to grant leave to the Plaintiff Applicant to construct a skeleton file.**
 9. On 26th February 2014 the Court granted an order certifying the application as urgent and ordered that it be served for hearing inter partes.
 10. Plaintiff filed yet another Notice of Motion dated 27th February 2014 seeking orders that-

- That 1st and 2nd Defendants by themselves, their servants and or agents or otherwise howsoever be restrained by temporary injunction from interfering with the Plaintiff's business on and occupation of the premises on Plot No. 971/972 MN Shimanzi Road pending the hearing and determination of the application dated 26th February, 2014.
- That the 1st and 2nd Defendants by themselves, their servants and or agents or otherwise howsoever be restrained by temporary injunction from interfering with the Plaintiff business on and occupation of the premises on Plot No. 971/972 MN Shimanzi Road pending the hearing and determination of this suit.
- That the 1st Defendant by itself its servant and or agents or otherwise howsoever be restrained by temporary injunction from dealing with or in any way interfering with the suit property on Plot No. 971/972 MN Shimanzi Road pending the hearing and determination of this suit.

ANALYSIS

11. I have taken the trouble to go into all the prayers of the applications that this Court was called upon to determine because it will be seen that Plaintiff undoubtedly has abused the court process by filing at least three applications which seek exactly the same orders. The Plaintiff needs to be reminded that such action goes contrary to the overriding objective of the Civil Procedure Act. That objective is to ***“facilitate the just, expeditious, proportionate and affordable resolution of the Civil disputes.”***
12. But perhaps more importantly it should be noted that the Plaintiff's claim in his Plaint before Court is based solely on the allegation that he is not a tenant of the 1st Defendant but rather that he is a tenant of the Police. He has pleaded that he was contracted by the Police at the Port to carry out the business of Canteen for use by the Police. Plaintiff's three applications for injunction are all based on that allegation, that he is not a tenant of the 1st Defendant. Mind you the 1st Defendant has exhibited rental payments to it by the Plaintiff even letters written by the Plaintiff whereby Plaintiff forward his rent to the 1st Defendant. Orders of injunction are equitable in nature. Accordingly the maxim that, he who comes to equity must come with clean hands applies to the Plaintiff. Does he have clean hands? The answer to that cannot be determined in the absence of the Police being asked to confirm their relationship with the Plaintiff.
13. I need further to say that when a party appears before Court for ex parte injunction order, as the Plaintiff has done now at least three times, there is an obligation on such a party to do so with utmost good faith (uberrima fide). Such a party should be candid. That is the gist of the following decisions-

“In the case of Mobile Kitale Service Station –Vs- Mobil Oil Kenya Limited & another (2004)eKLR the Hon. Justice Warsame held-

‘An interlocutory injunction is given on the Court's understanding that the defendant is trampling on the rights of the Plaintiff. An interlocutory injunction, being an equitable remedy, would be taken away (discharged) where is shown that the person's conduct with respect to matters pertinent to the suit does not meet the approval of the Court which granted the orders which is the subject matter.

The orders of injunction cannot be used to intimidate and oppress another party. It is a weapon only meant for a specific purpose – to shield the party against violation of his rights or threatened violation of the legal rights of the person seeking it.”

UHURU HIGHWAY DEVELOPMENT LIMITED –Vs- CENTRAL BANK OF KENYA & OTHERS CIVIL APPLICATION NO. 140 OF 1995 where the Judges of Court of Appeal had the following to say-

‘.... Order 39 Rule 3(1) of the Civil Procedure (revised) Rules (now Order 40 of the civil Procedure Rules, 2010) permits the granting of ex parte injunctions but it must clearly be understood that a party who goes to a judge in the absence of the other side assumes a heavy burden and must put before the Judge all the relevant materials, including even material which is against his interest. The basis for this requirement is obvious; it is a universal rule of natural justice that Court orders ought to be made only after hearing or giving all the parties an opportunity to be heard. Ex parte orders, whether they be injunctions or whatever, form an exception to this rule and for a party to benefit from the exemption, there must be a good and compelling reason for it.

.... I would add my voice to that of my learned brothers that there cannot be any legal authority for obtaining an ex parte injunction on one basis, and when it comes to the inter partes hearing of the application, a totally different or even a more detained basis is advanced to support the ex parte order. A party who has obtained an ex parte order must be able to support that order, at the inter parties hearing, on the very same grounds upon which he was able to obtain it in the first place. I would also agree that the granting of ex parte injunctions should be the exception rather than the rule. Ole Keiwua, J found as a fact that the applicant obtained the ex parte order of injunction by concealing from Githinji, J relevant material which it could have been in a position to disclose to the later learned Judge.”

14. But before concluding this Ruling I need to say that it is a concern to this Court that 1st Defendant had contracted 2nd Defendant in November 2012 to carry out major repairs in the premises, which repairs the Public Health Officer of the then County Council of Mombasa had demanded be undertaken. Due to the injunctive order granted to the Plaintiff those repairs stalled since then.

15. Indeed it was the 1st Defendant show of interest to restart the repairs in February 2014 that led Plaintiff to file two more injunctive applications dated 26th and 27th February 2014. There is no doubt the 1st Defendant has been frustrated in carrying out those necessary repairs. As consequence of the Court appreciating that fact the 1st and 2nd Defendants will be granted access to the premises to carry out repairs.

CONCLUSION

16. As consequence of my discussion above I grant the following orders-

- a. **The Notice of Motions dated 26th November 2012, 4th December 2012, 26th February 2014 and 27th February 2014 shall be determined by this Court after the Officer-In-Charge of the Port Police provides information on the tenancy of the Plot No. 971/972 MN Shimanzi Road.**
- b. **The Attorney General is hereby ordered to assist this Court to obtain an affidavit sworn by the Officer-In-Charge of the Port Police Station whereby that Officer will inform the Court whether or not DAVID MWALIMO MWANGEKA is a tenant of the Police at Plot NO. 971/972 MN Shimanzi Road Mombasa. If he is a tenant the said Officer-In-Charge of Port Police shall indicate the period of such tenancy.**
- c. **An extracted order of today’s Ruling shall be served by the Deputy Registrar of this Court upon the office of the Attorney General.**
- d. **The 1st and 2nd Defendants are granted access to Plot No. 971/972 MN Shimanzi Road for the purpose of carrying out repairs. If such repairs cannot be done while the Plaintiff is in occupation, the Plaintiff shall give vacant possession within 7 days from today to enable such repairs to be done.**
- e. **Each party is granted leave to move the Court, if necessary.**

- f. A mention date shall be given at the reading of this Ruling, for the purpose of the Court receiving the affidavit as stated in (b) above.

DATED and DELIVERED at MOMBASA this 3RD day of MARCH, 2015.

MARY KASANGO

JUDGE