



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 25 OF 2015

MARY WANJIKU KAMAU..... 1ST APPLICANT

VERSUS

EPHANTUS MWANGI KANGARA.....RESPONDENT

RULING

1. This ruling is the outcome of the notice of motion dated 20th January 2015. The aforesaid was taken out by Mary Wanjiku Kamau, the Plaintiff/applicant herein, in which she sought for the following orders inter alia.

- a. ***THAT this application be certified as urgent and service dispensed with the same be heard ex parte at the first instance.***
- b. ***THAT this Honourable court do issue and interlocutory injunction restraining the Defendant by himself, his employees, servants and/or agents from harassing, intimidating the plaintiff and her staff and or howsoever interfering with the operations and management of DEMJI ENTERPRISES and of the Plaintiff's quiet possession of the said business being s a shop premises located in Kiharu House, on plot No. 20/2075, pending the hearing of this suit.***
- c. ***THAT an injunction do issue restraint the defendant from entering the said shop, selling or disposing or transferring or taking away any property from the said premises or demanding or collecting any accounts receivables in respect of Demji Enterprises pending the hearing and determination of this suit.***
- d. ***An injunction compelling the defendant to forthwith remove from the suit premises the padlocks he has unlawfully placed on the plaintiff's business premises pending the hearing of this suit.***
- e. ***An order compelling the defendant to return to the plaintiff all the property he has unlawfully taken from the premises including but not limited to cash sale receipts, invoices, laptop computer, stock cards, bank records, licence, Registration Certificate, PIN Certificate and other books all belonging to the plaintiff's business aforesaid, and to account for the stock he took there from.***
- f. ***A declaration that the plaintiff is the lawful owner of the business premises occupied by the said Demji Enterprises in Kiharu house situated on Plot no. 20/2075, Nairobi.***
- g. ***An order do issue that the Officer Commanding Station (OCS) at Kamukunji Police Station do assist in Execution of these orders.***
- h. ***THAT cost of this application be provided for.***

2. The Applicant swore three affidavits to support the motion.

When served, Ephantus Mwangi Kingara he opposed the motion by filing two replying affidavits. When the motion came up for inter partes hearing learned counsels recorded a consent order to have the same

disposed of by written submissions.

3. I have considered the grounds set out on the face of the motion plus the facts deponed in the affidavits filed in support and against the application. I have also taken into account the rival written submissions.

4. At this stage the main prayer being sought by the Plaintiff is that of an interlocutory order of injunction to restrain the Defendant from harassing, intimidating the Plaintiff or from interfering with the operations and management of Demji Enterprises and the quiet possession of the shop business located in Kiharu House on plot no. 20/2075 pending the hearing of and final determination of this suit. The principles to be considered in determining such an application are well settled. The first principle is that the applicant must show that she has a prima facie case with a probability of success. In an attempt to show that she has a prima facie case, the Plaintiff stated that she is the bonfide owner of Demji Hardware Enterprises which she claimed in also known as Demji Enterprises. She argued that this court should intervene to enable her secure her hardware business which is now in danger of fraudulently being taken over by the Defendant. The Plaintiff stated that she conceived the idea of Demji Enterprises as her business name in 2008 under number 496380 pursuant to the Provisions of the Registration of Business Names Act as a sole proprietor and that she operates a hardware shop in the name and style of Demji Hardware Enterprises. It is her submission that the aforesaid business has never been a joint venture between her and the Defendant. She was emphatic that her relationship with the Defendant was basic romantic. The Defendant on the other hand has denied the Plaintiff's assertion. It is the Defendant's submission that he is the founder and owner of the business name Demji Hardware Enterprises along Duruma Road and that the business was registered in his name in the year 2011. When he executed a tenancy agreement with one Gerishom Kimotho Karobere. The Defendant further pointed out that the tenancy agreement has never been disputed by Emily Wanjiru Karobere, the co-administrator of the estate of Erastus Karobere, deceased. The Defendant further argued that before Gerishon Karobere died, he had sworn and affidavit showing that the Defendant had leased the demised premises as a shop. In short, the Defendant's case is that the Plaintiff's business is known as Demji Enterprises and not Demji Hardware. In essence the Defendant is submitting that Demji Enterprises are two distinct entities. The Defendant avers that the Plaintiff has been illegally benefiting courtesy of the interim injunctive orders issued on 23rd January 2015. After a careful consideration of the material placed before this court, there is no doubt in my mind that the disputants herein operated business within the building known as Kiharu House standing on L.R. No. 209/2075. I have carefully perused annexure EMK 2 attached to the further affidavit of Ephantus Mwangi Kang'ara and it would appear that the Defendant was the person who secured the tenancy over the aforesaid premises.

5. In paragraph 11 of the further affidavit of Mary Wanjiku Kamau, the Plaintiff avers in part that the Defendant has made contradictory averments in that the Defendant he at one point stated he solely operated Demji Hardware Enterprises yet he previously stated that since 2009, both operated under both names without any differentiation until 2014 when this dispute erupted. The Plaintiff denied the existence of two separate businesses. What appears from the material placed before this court is that both the Plaintiff and the Defendant have in one way or another had business dealings in the suit premises. What is not clear is whether or not the duo had joint business ventures. But what emerges from the pleading and the affidavit evidence is that the Plaintiff's presence in the business is visible. There is also affidavit evidence that the Defendant has been paying rent using the name Demji Hardware Enterprises. The Defendant has also alluded that there is need to separate Demji Enterprises, operated by the Plaintiff from Demji Hardware Enterprises which he operates to avoid confusing their customers. In my view, this is not a clear cut case where the court can believe or disbelieve either side. It is a case which requires a hearing which will give parties an opportunity to interrogate the veracity of evidence tendered. Each side has shown the interest they have over the demised premises. The motion cannot therefore be determined on the basis of a prima facie case.

6. The second principle which should be established is that the applicant must show that she will suffer irreparable loss if the order of injunction is denied. There is no dispute that hardware business is being operated at the premise, it is also not in question that the Defendant had purported to lock the premises but the same was opened after this court issued temporary orders of injunction. If the business premises is shut, it goes without saying that a colossal amount of damage will arise. The same may lead to the

termination of the lease. This in my view is a damage which cannot be compensated in monetary terms. The Defendant on the other hand has also stated that the Plaintiff should instead be restrained from operating Demji Hardware Enterprises and be directed to stick to Demji Enterprises until the ownership dispute is resolved. The Defendant is of the view that the envisaged damage and be ascertained in monetary terms by taking accounts of the existing stock. In my view, the kind damage which may result may be quantified but the figure may be so colossal that no one pay. In my estimation, i am convinced, the Plaintiff has satisfied this principle.

7. The third principle is the balance of convenience. In this dispute, the Plaintiff avers that the Defendant locked the premises she is running her business. The Defendant did not seriously contest this averment. It is the Defendant's submission that since both of them are claiming ownership of the demised premises, the status quo should be maintained until this suit is heard and determined. What is clear in my mind is that the Defendant does not claim that the part where he operates his business if any has been blocked or interfered with by the Plaintiff. I find that on this account, the party who will be most inconvenienced is the Plaintiff.

8. I have already alluded that this dispute requires a quick resolution by hearing the substantive suit. This is one of those cases which the court must step in to give schedules to expedite the hearing and determination of the case. I hereby confirm the interim order to last until the suit is heard and determined. However, I direct the parties to comply with the provision of order 11 of the Civil Procedure Rules and appear before this court on 30th July 2015 to confirm compliance and to fix a hearing date.

9. Costs of the motion to abide the outcome of this suit.

Dated and delivered in open court this 10th day of July 2015

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent