



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT ELDORET**  
**CIVIL SUIT NO. 180 OF 2007 (O.S.)**

**A N M.....PLAINTIFF**

**VERSUS**

**J W K.....DEFENDANT**

**RULING NO. 2**

1. The plaintiff and defendant are divorced. The plaintiff prays for an interlocutory order to *restrain* the defendant from *blocking* her access to premises described as *Lock-up Shop on Plot No. 42* (hereafter *the business premises* or *the shop*).
2. The plaintiff has presented a notice of motion dated 24<sup>th</sup> September 2014. She contends that the shop is a matrimonial property; that the defendant has denied her access to it in contravention of an earlier order dated 26<sup>th</sup> March 2008; that the defendant's relatives falsely accused her of theft and assaulted her; and, that she has suffered prejudice by being barred from the shop. Those matters are buttressed in a deposition by the plaintiff sworn on even date.
3. The motion is contested. There is a replying affidavit of the defendant sworn on 10<sup>th</sup> July 2015. The defendant denies barring the plaintiff from accessing the shop. But he takes up cudgels on her erratic behavior that interferes with customers and disrupts operations at the shop. At paragraph 10, he deposes that the plaintiff came to the shop, "*caused mayhem [and] inflicted injuries on [his] head with a blunt object*". He has exhibited a P3 form. He avers that the plaintiff unilaterally sacked one of his employees. He has also annexed copies of the divorce proceedings.
4. On 15<sup>th</sup> July 2015, I heard learned counsel for the parties. I have carefully considered the notice of motion, pleadings, depositions, documents and the rival submissions.
5. This is the *second* time in a short span of a year that the parties are litigating another interlocutory motion before me. The first time, it was the defendant seeking to bar the plaintiff from the same shop. In a considered ruling delivered on 10<sup>th</sup> July 2014, I dismissed the motion. The shoe is now on the other foot. In the ruling, I observed as follows-

*"The root of this suit is a bitter matrimonial dispute. It is complicated by the couple's tussle over property. The originating summons was brought by the wife seeking declarations under section 17 of the Married Women's Property Act 1882. One of her prayers was that she was entitled to the property known as Eldoret Municipality Block [particulars withheld]. The plaintiff claimed it was the matrimonial home. On the same date the suit was filed, divorce proceedings were presented*

before the subordinate court at Eldoret. Contemporaneously with the suits, the plaintiff took out a chamber summons dated 26<sup>th</sup> October 2007 to restrain the defendant by injunction from alienating or dealing with the suit property”.

6. On 7<sup>th</sup> December 2007, the parties had recorded a consent settling the interlocutory matters in the following terms, that-

“a) Temporary injunction be and is hereby issued to restrain the defendant’s agent from selling, mortgaging, charging, transferring, alienating, wasting or in any other way dealing with the matrimonial property known as Eldoret Municipality Block [particulars withheld] pending the hearing and determination of the suit.

b) Temporary injunction be and is hereby issued to restrain the defendant from entering or occupying the matrimonial property known as Eldoret Municipality Block [particulars withheld] pending the hearing and determination of the suit.

c) Defendant do operate the family property and business on plot number [particulars withheld] at the main market and any other business on condition that he will not sell, transfer or let out any part thereof pending the hearing and determination of the suit.”

7. That order is a relevant backdrop to this motion. In addition regard must be had to paragraphs 11 and 12 of my ruling of 10<sup>th</sup> July 2014. I then held as follows-

“I have studied condition (c) in the order of consent of 7<sup>th</sup> December 2007. When placed in the context of the matrimonial dispute, and on a proper reading of the entire order, the parties expressly acknowledged that the shop was a family property or business. The property was to be run by the defendant but he was not to lease it or alienate it.

“There was no bar to the plaintiff accessing the premises. But that does not mean that the plaintiff can disrupt the business, assault the defendant or interfere with customers.....”

8. The applicant has not cited any legal provisions anchoring the present notice of motion. The defendant has attacked the motion on that front. In view of article 159 (2) (d) of the Constitution; and, the overriding objective of the court, the failure is not entirely fatal. See Harit Sheth Advocate v Shamas Charania Nairobi, Court of Appeal, Civil Appeal 68 of 2008 [2010] eKLR, Stephen Boro Gitiha v Family Finance Bank & 3 others. Nairobi, Court of Appeal, Civ. Appl. 263 of 2009 (UR 183/09) [2009] eKLR.

9. On the face of it, the motion seeks interlocutory *injunctive* relief. The principles governing the grant of prohibitive injunctions are well settled. A litigant must rise to the threshold laid in Giella v Cassman Brown and Company Limited [1973] E.A 358. Those principles are first, that the applicant must show a *prima facie* case with a probability of success; secondly that he stands to suffer irreparable harm not compensable in damages; and thirdly, if in doubt, the court must assess the balance of convenience.

10. An injunction is a discretionary remedy. A party who comes to equity with unclean hands will be denied the remedy. See Kenya Hotels Limited Vs Kenya Commercial Bank and another [2004] 1 KLR 80, Public Trustee Vs Nicholas Kabucho Murimi HCCC ELC 610 of 2011 [2012] e KLR, George Munge Vs Sanjeev Sharma & 3 others HCCC ELC 677 of 2011 [2012] e KLR.

11. The plaintiff deposes at paragraph 12 of her affidavit that she has at no time interfered with the business at the shop. I do not believe her. I doubt very much that she would just visit and seat innocently outside the shop or keeping a look out on the business. The consent order of 7<sup>th</sup> December 2007 was a trade-off: The plaintiff got the matrimonial house; the defendant was barred from accessing it. Under condition (c) of the consent, the defendant was “to operate the family property and business on plot number 42 at the main market and any other business on condition that he will not sell, transfer or let out any part thereof pending the hearing and determination of the suit.”

12. The defendant now says that the plaintiff interferes with customers and disrupts operations at the shop. At paragraph 10, he deposes that the plaintiff came to the shop, “caused mayhem [and] inflicted injuries on [his] head with a blunt object”. He has exhibited a P3 form documenting the injuries. He avers that the plaintiff sacked one of his employees without consulting him. Those matters have not been controverted by the plaintiff. It only goes to fortify my finding that the plaintiff is abusing the consent.

13. Like I stated in my ruling of 10<sup>th</sup> July 2014, the consent did not expressly “*bar the plaintiff from accessing the premises. But that [did] not mean that the plaintiff can disrupt the business, assault the defendant or interfere with customers*”. That is exactly what the plaintiff has been doing: disrupting the business, sacking an employee, and, if the defendant is to be believed, assaulting him. The plaintiff on the other hand alleges that the defendant instigated his relatives to assault her. She has annexed a charge sheet against one Harun Muguru. The plaintiff is named as the complainant.

14. From the available evidence, the plaintiff has not approached the court with clean hands. See *Kenya Hotels Limited Vs Kenya Commercial Bank and another* [2004] 1 KLR 80. She has not also shown how staying out of the business at the shop will cause her damage or loss. She has just made a general statement at paragraph 9 of the affidavit that she “has suffered since [she is] currently not allowed to access” the shop. The main suit in the originating summons is still pending. The rights of the parties to the matrimonial properties have not been established. On a balance of convenience, the scales of justice tilt in favour of the defendant running the *business* at the shop freely.

15. I think it is no longer practical to have the estranged couple run a common business at the shop. It is also important to distinguish the *business* carried on at the shop from the *title* to the shop. The plaintiff may have an interest in the *title*. It will be determined in the originating summons on tested evidence. And it is not lost on me that the order of 7<sup>th</sup> December 2007 prohibits the defendant from selling or leasing the matrimonial properties.

16. I have said enough to show that the present motion does not further the overriding objective to do justice. See *Stephen Boro Gitihia v Family Finance Bank & 3 others* Nairobi, Court of Appeal, Civ. Appl. 263 of 2009 (UR 183/09) [2009] eKLR. The words of Nyamu JA ring true-

*“If the often talked backlog of cases is littered with similar matters, the challenge to the courts is to use the new ‘broom’ of overriding objective to bring cases to finality by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible”*

17. The upshot is that the plaintiff has not made out a *prima facie* case against the defendant. The plaintiff’s notice of motion dated 24<sup>th</sup> September 2015 is hereby *dismissed*. I am persuaded that the plaintiff should *no* longer have *access* to the shop until the hearing and disposal of the *originating summons*. The root cause of the dispute can only be addressed at a *full hearing on tested evidence*: not by trying the suit through numerous and competing interlocutory motions. The *originating summons* should thus be set down for *directions* and *hearing* without any further delay. In the interests of justice, I will proceed to grant the parties a convenient date for directions or hearing of the main suit. Costs shall be in the cause.

It is so ordered.

**DATED, SIGNED and DELIVERED at ELDORET this 8<sup>th</sup> day of October 2015.**

**GEORGE KANYI KIMONDO**

**JUDGE**

**Ruling read in open court in the presence of:**

No appearance for the plaintiff.

Mr. Omboto for the defendant instructed by Rioba Omboto & Company Advocates.

Mr. J. Kemboi, Court clerk.