



**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**

1. The defendant seeks to restrain the plaintiff from interfering with the defendant's business at premises described as *Lock-up Shop on Plot No. 42* (hereinafter *the business premises or the shop*). The prayer is predicated upon the terms of an order of the Court made on 7<sup>th</sup> December 2007. The defendant also wants the plaintiff cited for contempt of court. The defendant's notice of motion is dated 8<sup>th</sup> May 2014. The grounds are pleaded in a deposition by the defendant sworn on even date. Before delving further into the matter, I will highlight the history of the litigation which is material to the motion before the Court.

2. 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.

3. On 7<sup>th</sup> December 2007, the parties recorded a consent settling the chamber summons 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 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."*

4. That is the order that has precipitated this motion. The shoe is now on the other foot. The defendant now claims that the plaintiff has breached the order. It is averred that when parties left court after a routine hearing on 30<sup>th</sup> April 2014, the plaintiff went to the shop, claimed that the suit had been dismissed, and disrupted business at the shop. The defendant states that she caused “*mayhem....and her uncouth behavior frustrated customers of the defendant*”. The defendant claims he was assaulted by the plaintiff. A P3 form issued by the police is annexed. There are photographs annexed to the motion showing the plaintiff seated outside the business premises. The defendant’s case is that the conduct of the plaintiff is calculated to harm the defendant and lower the dignity of the court.

5. The motion is contested. There is a replying affidavit of the plaintiff sworn on 29<sup>th</sup> May 2014. She claims the business is a family undertaking and that there are no orders barring her from accessing the premises. She avers that the defendant has been paying her a daily allowance for working at the shop. She denies the allegations by the defendant including the assault. She deposes that it is the defendant and his girlfriend, a policewoman, who are trying to evict her from the shop. Lastly, she averred that there is an order in bankruptcy against the defendant, and accordingly, the defendant cannot maintain the present proceedings.

6. On 19<sup>th</sup> June 2014, I heard arguments from the learned counsels for the parties. I have considered the pleadings, depositions and rival submissions. The motion is brought under the provisions of Order 40 of the Civil Procedure Rules 2010. Like I stated, it seeks injunctive reliefs and to punish the plaintiff for contempt of court.

7. 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.

8. Being a discretionary remedy, there is also ample authority that a party, who has acted in a manner not acceptable to a court of equity, 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.

9. The conditions outlined in *Giella’s* case (supra) are sequential “*so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed*” *Kenya Commercial Finance Company Ltd Vs Afraha Education Society* [2001] 1 E.A. 86.

10. In *Mrao Limited Vs First American Bank of Kenya Ltd and others* [2003] KLR 125, the Court of Appeal stated that a *prima facie* case is one –

“*Which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter*”.

11. 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.

12. 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. The alleged assault is a criminal matter. The P3 form does not indicate where the assault took place. Even if I was prepared to accept the defendant’s version that it was at the shop precincts, the plaintiff still denies it. Regrettably, there is no clear evidence that she has been disrupting the business. The plaintiff herself has not produced evidence to show she was being paid a daily allowance. I must accept that the photograph shows she was at the

premises. Beyond the conflicting affidavit evidence, a question looms large over the bankruptcy cause. The defendant claims he was discharged; the plaintiff contests the assertion. All those matters are best left to the trial court on tested evidence.

13. In view of the consent order delimiting the shop as a *family property or business*, I am hard pressed to say that the defendant has established a strong *prima facie* case for grant of interlocutory injunction. Having reached that conclusion, I need not consider whether damages are an adequate remedy or even to weigh the balance of convenience. Kenya Commercial Finance Company Ltd Vs Afraha Education Society [2001] 1 E.A. 86. The defendant's prayer for injunction is accordingly dismissed.

14. Under Order 40 rule 3 of the Civil Procedure Rules 2010, the court has jurisdiction to punish a person for breach of an order of injunction. The punishments range from imprisonment to forfeiture of property. The power is exercised to protect the dignity of the court. It is meant to ensure that the streams of justice remain pure. Contempt of court is a criminal offence. The standard of proof is thus quite high. The punishment can lead to loss of liberty. As a result, it must be proved that the contemnor was served with the court order and disobeyed it. It must be clear from her overt acts that she intended to breach the order of court.

15. I have already found that the court order of 7<sup>th</sup> December 2007 *did not* bar the plaintiff from accessing the shop. I am unable to hold in the circumstances that her alleged activities or misconduct at the shop were in direct *violation* of the court order. It seems to me that the plaintiff's conduct is a negative reaction to the alleged relationship between the defendant and another woman. The plaintiff may as well be unreasonable in the circumstances. If the allegations by the defendant of her misconduct and assault are true, the remedies do not lie in a motion for contempt: they, *obiter*, point to the direction of criminal proceedings and other civil actions for compensation or damages.

16. Granted all the above reasons, the notice of motion by the defendant dated 8<sup>th</sup> May 2014 is devoid of merit. It is hereby dismissed. Costs however shall be in the cause.

It is so ordered.

**DATED, SIGNED and DELIVERED** at **ELDORET** this 10<sup>th</sup> day of July 2014.

**GEORGE KANYI KIMONDO**

**JUDGE**

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

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

No appearance for the plaintiff.

Mr. A. Weyama, Court clerk.