



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO 105 OF 2014

EZEKIEL KAMAU.....PLAINTIFF

VERSUS

MUCHOKI MWAI WILSON.....DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Notice of Motion application dated 8th July 2014 and filed on 9th July 2014 was brought pursuant to the provisions of Sections 3A and Section 63 (e) of the Civil Procedure Act, Order 40 Rules 1 and 2 and all the enabling powers and provisions of the law. Prayer No (1) was spent. It sought the following remaining orders:-

1. Spent.
2. **THAT pending hearing and determination of this suit the defendant be restrained from alienating, wasting or assigning the property of Oilden Limited the petrol station and all other businesses operating on Plots Numbers 10 and 7 at Ngimu off Mombasa Road.**
3. **THAT pending hearing and determination of this suit the proceeds of Oilden Limited, petrol station and all other businesses operating on Plots Numbers 10 and 7 at Ngimu off Mombasa Road be deposited at Oilden Account Number 01109266697800 Co-operative Bank.**
4. **THAT costs be borne by the defendant.**

THE PLAINTIFF'S CASE

2. The Plaintiff and the Defendant were partners in Oilden Company Limited in which they held one hundred and fifty (150) and three hundred and fifty (350) shares respectively. They were operating a petrol station, butchery, restaurant, lodging, bar, Mpesa Shop and barber shop at Plots Nos 10 and 7 at Ngimu off Mombasa Road (hereinafter referred to as "the subject premises") until April 2012 when the Defendant forcefully ejected the Plaintiff from the business.

3. Since then the Defendant had been enjoying the proceeds from the business to the Plaintiffs' exclusion as a result of which he had been deprived of a livelihood. It was therefore necessary for the property to be preserved pending the hearing and determination of the suit herein.

LEGAL ANALYSIS

4. Although the issue of entry of interlocutory judgment against the Defendant was not an issue that was before the court for determination, the court merely wants to observe that the entry of interlocutory judgment against the Defendant herein was irregular for the reason that the prayers sought in the Plaintiff were not of a liquidated nature as is envisaged in Order 10 Rule 4 of the Civil Procedure Rules, 2010. The Plaintiff is therefore requested to bear this in mind.

5. Turning to the substantive issue at hand, on 22nd September 2014, the court gave directions as regards the filing of affidavits and written submissions and directed that parties appear before it on 29th October 2014 with a view to highlighting the submissions and/or for further orders and/or directions by the court. The Plaintiff filed his written submissions dated 28th October 2014 on 29th October 2014. The Defendant neither filed his written submissions nor attended court on the said date which had been taken by consent. The court therefore reserved the ruling of the application herein based on the Plaintiff's written submissions on the court file.

6. The court has considered the affidavit evidence and the Plaintiff's submissions and the case law in support thereof and hereby finds that it would be just and in the interests of justice for it to grant the orders sought in the Plaintiff's application on two (2) grounds.

7. Firstly, this was because the application was unopposed. Secondly and most importantly, the Defendant would suffer no prejudice if he was restrained from alienating, wasting or assigning the property of Oilden Limited, the petrol station and all other businesses operating on Plots Numbers 10 and 7 at Ngimu off Mombasa Road or from depositing all proceeds of Oilden Limited, petrol station and all other businesses operating on Plots Numbers 10 and 7 at Ngimu off Mombasa Road at Oilden Account Number 01109266697800 Co-operative Bank Limited. The balance of convenience tilts in favour of the Plaintiff to preserve the subject property pending the hearing and determination of the suit herein.

DISPOSTION

8. The upshot of this court's ruling is that the Plaintiff's Notice of Motion application dated 8th July 2014 and filed on 9th July 2014 was merited and the same is hereby granted in terms of Prayer Nos (2) and (3) therein. Costs will be in the cause.

9. In view of the nature of the orders that have been granted herein, the parties are hereby directed to fully comply with the Practise Directions of the High Court of Kenya Commercial & Admiralty Division Kenya Gazette Notice Number 5179 of 28th July 2014 and thereafter fix a date for the case management conference at the registry.

10. It is so ordered.

DATED and DELIVERED at NAIROBI this 2nd day of December 2014

J. KAMAU

JUDGE