



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CIVIL CASE NO. 160 OF 2012**

**KIPKOECH LAGAT T/A**

**KAPTARAKWA ENTERPRISES ..... 1ST PLAINTIFF**

**GABRIEL MAMETT ..... 2ND PLAINTIFF**

**KIPTUM CHELAGAT ..... 3RD PLAINTIFF**

**DAVID YEGO ..... 4TH PLAINTIFF**

**JOHN KEITANY ..... 5TH PLAINTIFF**

**CHEPTOO RONO ..... 6TH PLAINTIFF**

**KIPCHIRCHIR CHERUTICH ..... 7TH PLAINTIFF**

**GABRIEL KIPTOO ..... 8TH PLAINTIFF**

**SAMWEL ROTICH ..... 9TH PLAINTIFF**

**JOHN K. RONO ..... 10TH PLAINTIFF**

**CHRISTOPHER KIGEN ..... 11TH PLAINTIFF**

**KIPLAGAT WENDOT ..... 12TH PLAINTIFF**

**JOHN RUTTO ..... 13TH PLAINTIFF**

**CLEMENT KOTUT ..... 14TH PLAINTIFF**

**BENJAMIN KISABEI ..... 15TH PLAINTIFF**

**KIPTOO KIMANYINY ..... 16TH PLAINTIFF**

**KIPLAGAT CHERUTICH ..... 17TH PLAINTIFF**

**PIUS CHEPKEITANY ..... 18TH PLAINTIFF**

**MUSA KIPLAGAT ..... 19TH PLAINTIFF**

**CHRISTOPHER KIPLAGAT KARAMAI ..... 20TH PLAINTIFF**

**JULIUS KIPLAGAT ..... 21ST PLAINTIFF**  
**KIPROTICH KIGEN..... 22ND PLAINTIFF**  
**PAUL CHEMOIYWO ..... 23RD PLAINTIFF**  
**RAPHAEL ROTICH ..... 24TH PLAINTIFF**

**VERSUS**

**WILLIAM BAYAS ..... 1ST DEFENDANT**  
**EZEKIEL CHERUIYOT ..... 2ND DEFENDANT**  
**TITUS KORIR ..... 3RD DEFENDANT**  
**KEIYO HOUSING CO-OP. SOCIETY ..... 4TH DEFENDANT**

**RULING**

The application for determination is Notice of Motion dated 31st July, 2012 brought under Order 51, Rule 1, Order 40 Rules 1 and 2 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. It is brought by the 1st Plaintiff who seeks an order that the Applicant's premises namely the bar, the hotel and the guest house situate on a portion of the premises known as **ELDORET MUNICIPALITY BLOCK 7/72** be opened and the Applicants do continue their businesses pending the hearing and determination of the application inter parties, that there be an order that the Respondents closure of the premises by themselves through their agents is illegal, unprocedural and prejudicial to the Applicant and that there be an order of permanent injunction to restrain the Respondents from any further interference on the Applicant's use of the business premises namely a bar, hotel and guest house pending the hearing and determination of the Eldoret High Court Civil Appeal No. 38 of 2012 and Eldoret High Court Miscellaneous Civil Application No. 15 of 2012.

This application was filed simultaneously with a plaint dated 31st July, 2012 in which the Plaintiffs prayed for orders against the defendants for:-

- (a) An order of declaration that the Defendants' action is illegal, unprocedural and in total disregard to the court process and the same is null and void.
- (b) An order of permanent injunction to restrain the Defendants by themselves, their agents and/or servants from interfering with the Plaintiffs occupation, use and enjoyment of the premises.

From the plaint, the prayer in (a) above arises from the Defendants' illegal and unauthorized closure of the Plaintiffs' business premises on claim that Eldoret High Court Miscellaneous Civil Application (HCMCA) No. 15 of 2012 had been determined in their favour.

The Defendants opposed the application and subsequently filed a Notice of Preliminary Objection dated 31st day of August, 2012 and Replying Affidavits by Abraham Yator, John K. Kwambai and William Bayas sworn on 7th August, 2012 in respect of the first two deponents and on 13th August, 2012 by the 3rd deponent.

Subsequently thereafter, the Plaintiffs amended the plaint vide an amended plaint dated 21st November, 2012 in which the following additional prayers were sought:-

- (i) An order of declaration that the Plaintiffs being members of Kaptarakwa Co-operative Society are the co-owners of that premises known as Eldoret Municipality Block 7/72 together with Chepkorio Co-operative Society and Metkei Co-operative Society and the Defendants have no

authority to terminate or interfere in any other way the plaintiffs use, ownership or enjoyment of the said premises.

(ii) An order of permanent injunction to restrain the Defendants by themselves, their agents and/or servants from interfering with the Plaintiff's occupation, use and enjoyment of the premises pending the hearing and determination of Eldoret High Court Civil Appeal No. 38 of 2012 and Eldoret High Court Miscellaneous Civil Application No.15 of 2012.

(iii) Loss of profits.

(iv) General damages.

The amended plaint also introduced twenty three (23) other Plaintiffs described as members of the Kaptarakwa Enterprises, on whose behalf the 1st Plaintiff, being its Chairman had brought the suit. The application however, was not amended to reflect the additional number of Plaintiffs, but orders given herein would apply to all parties.

The application has cited weighty arguments. Parties have also filed a plethora of authorities in support of their individual arguments. I find it important therefore to set the background of this matter as I understand it.

This suit arises from a reference that was heard and determined by the Business Premises Rent Tribunal. The proceedings before the tribunal have been annexed to the supporting affidavit in the application sworn by the 1st Applicant on 31st July, 2012 and marked KL 5. It appears that two references were filed being Tribunal Cases No. 24 of 2010 and No. 40 of 2010. It appears like the Chairman of the Tribunal gave a consolidated Judgment as there exists only one Judgment on record delivered on 30th March, 2012 in Tribunal Case No. 40 of 2010. In the Judgment the Chairman ordered that the orders given do apply in Tribunal Case No. 24 of 2010.

In both Tribunal Cases, Kaptarakwa Enterprises is named as the Applicant/Tenant and Keiyo Housing Co-operative Society as the Respondent/Landlord.

The observations of the Tribunal were as follows:-

**“On 23rd March, 2010 the tenants Kaptarakwa Enterprise filed a complaint in Case No. 24 of 2010 complaining that the Landlord had issued an illegal seven days notice to terminate the tenancy. They also sought an order restraining the landlord from threatening to evict the tenants.”**

**“Though the proceedings were recorded in file No. 24 of 2010, I want to point out that the two cases No. 24/2010 and 40 of 2010 are very different. Case No. 24 of 2010 is a complaint by the tenant against the Landlord. This judgment therefore relates to Case No. 40 of 2010. I have however referred to Case No. 24 of 2010 in this Judgment since there are orders that I made on 1st January, 2010 that will become very relevant to this Judgment. The said order reads “pending hearing (under Section 6) the tenant to pay Ksh. 68,000/=, hearing next session ....”**

The Tribunal then made the following findings:-

**“It is my considered view that Keiyo Housing Co-operative Society has no locus and had no capacity to issue the notice. Keiyo Housing does not own the property, it is only managing the property for its clients, Kaptarakwa Co-operative Society. If indeed Keiyo Housing had the blessing of the Co-operative Society to terminate the tenancy so that it can renovate the premises, how come they did not issue the notice for and on behalf of the landlord? ...It is clear that Kaptarakwa Enterprises is a joint owner of the suit premises. Besides being owners, they also occupy the premises as tenants so they must pay rent. This rent is distributed to all the members at the end of the year including the tenant. So besides**

**being a tenant, the tenant is also an owner of the premises and therefore the landlord. ...On what basis then would the management committee, say that it has permission to terminate the tenancy when the owners of the building have not consented? From the foregoing, it is very clear that there is no tenancy relationship between the parties. I would decline to make a determination on the facts herein and dismiss the notice with costs to the tenant. ...The orders herein to apply in Case No. 24/2010”**

It is this Judgment of the Business Premises Rent Tribunal that has provoked a myriads of disputes, this suit being one. Others are:-

**1. Eldoret High Court Judicial Review Application No. 15 of 2012. It was filed by the Respondents/Landlords who lost in the Tribunal Judgment.**

The application for leave to file judicial review was granted by F. Azangalala, J. (as he then was). He granted leave to the Ex-parte Applicants to apply for an order of certiorari to remove into the court for purposes of quashing the decision/judgment of the Chairman Business Premises Rent Tribunal read and delivered on 30th March, 2012 in Business Premises Rent Tribunal Case No. 24 of 2010 and 40 of 2010.

The said leave granted was “to operate as a stay of enforcement or the placing of any mechanism of execution of the said Judgment pending the determination of the main motion” - See annexure AY 9 annexed to the Replying Affidavit.

**2. ELDORET HIGH COURT CIVIL APPEAL NO. 38 OF 2012**

The application was filed by the Defendants herein vide a Memorandum of Appeal dated 16th April, 2012 and filed on 17th April, 2012. Again, the same is an appeal against the Judgment of the Business Premises Rent Tribunal. In the main, the Appellants fault the Chairperson of the Tribunal, Hon. Mochache in making a determination over issues of ownership of the suit premises without the requisite jurisdiction.

**3. ELDORET CHIEF MAGISTRATE'S COURT MISCELLANEOUS APPLICAITON NO. 38 OF 2012**

The application dated 31st July, 2012 was filed by the Defendants seeking a break in order to be issued to the auctioneers to enter into the suit premises in enforcing distress for rent against the Plaintiffs. It was filed under Rule 9 of the Auctioneers Rules of 1997. The main prayer sought was that **“M/s. Ronboy Agencies be granted break in orders in levying of distress for rent against the Respondent at the premises known as Eldoret Municipality Block 7/72.”**

The break in orders were subsequently stayed on 3rd August, 2012.

Thereafter, the application was heard inter partes before Hon. E. A. Obina who gave the following orders:-

(a) The Preliminary objection dated 29th August, 2012 (the same having been filed by Ronboy Agencies) was dismissed.

(b) The orders of court granted on 31st July, 2012 allowing distress for rent were set aside and the status quo before 31st July, 2012 was to be maintained.

(c) The property carried away pursuant to the distress order, if any, was to be restored to the owner.

(d) Auctioneers costs were to await the outcome of the matter.

(e) Kaptarakwa Enterprises was granted leave to file a reply to the initial Notice of Motion dated

31st July, 2012 within fourteen (14) days.

Ronboy Agencies were aggrieved by the above orders and preferred an appeal giving rise to the fourth dispute.

#### **4. ELDORET HIGH COURT CIVIL APPEAL NO. 109 OF 2012**

The Appellants herein are Ronboy Agencies and Keiyo Housing Co-operative Society against Kaptarakwa Enterprises. The Appellants argue that the court lacked jurisdiction to entertain an application for injunction in the absence of a pending suit among other grounds of appeal raised.

Application in Chief Magistrate's Court Miscellaneous Civil Application No. 38 of 2012 and High Court Civil Appeal No. 109 of 2012 referred to above comprise annexures to the Supplementary Affidavit of the 1st Applicant sworn on 26th November, 2012 and filed in Court on 27th November, 2012 and are marked KCO 1 and KCO 3 respectively.

#### **5. THE INSTANT CIVIL SUIT**

##### **THE APPLICATION**

There are three main prayers in the application:-

- The suit premises be opened to enable the Applicants continue to run their businesses.
- An order that the closure of the premises by the Respondents is illegal, unprocedural and prejudicial to the Applicants.
- An order of permanent injunction against the Respondents restraining them from further interference with Applicant's use of the business premises.

My view is that any orders given pursuant to the 1st and 2nd prayers would be resultant upon determining whether an order for injunction is merited – which is the third prayer in the application.

The principles in granting an injunction are clearly spelt out in the reknown case of **GIELLA -VS- CASSMAN BROWN (1973) EA. 358** which are, that the Applicant must demonstrate that;

- He has a prima facie case with a probability of success.
- He stands to suffer irreparable loss and harm unless the orders sought are granted.
- In the event of doubts, the court is to decide the matter on a balance of convenience.

The meaning of probability of success was defined in **HABIB BANK AG ZURICH -VS- EUGENE MARION YAKUB CIVIL APPLICATION NO. NAIROBI 43 OF 1982 (Unreported)** as;

**“Probability of success means the court is only to gauge the strength of the Plaintiff's case and not to adjudge the main suit at the stage since proof is only required at the hearing stage.”**

In **FRANCIS JUMBA ENZIANO & OTHERS -VS- BISHOP PHILIP OKEYO & OTHERS, NAIROBI HIGH COURT CIVIL CASE NO. 1128 OF 2001 (Unreported)** Ringera, J. (as he then was), held:-

**“The settled principles for grant of an injunction are, first that the Applicant must show a prima facie case with probability of success at the trial and if the court is in doubt it**

**should decide the application on a balance of convenience .....**”

**Prima facie case with a probability of success**

From the history I gave of this suit, it is apparent that it has arisen because a party (Plaintiffs) has failed in successfully mitigating its case in other disputes. From a rent – payment dispute, the matter has now taken an angle of claim of interest in the suit premises. This is so because, vide the amended plaint, the Applicants have sought an order of permanent injunction against the Respondents from interfering with their quiet occupation and use of the suit premises being Eldoret Municipality Block 7/72 pending the hearing and determination of Eldoret High Court Civil Appeal No. 38 of 2012 and Eldoret High Court Miscellaneous Civil Application No. 15 of 2012.

The Defendant's case is that the premises is registered in the name of the 4th Defendant – Keiyo Housing Co-operative Society. But a copy of Certificate of Lease (Annexure AY 1(b) to the Replying Affidavit) shows that it is jointly owned by Chepkorio Farmers Co-operative Society Limited, Mitkei Farmers Co-operative Society Limited and Kaptarakwa Co-operative Society Limited. These three entities, interestingly form Keiyo Housing Co-operative Society Limited (4th Defendant).

The Plaintiffs argue that members of Kaptarakwa Enterprises are all members of Kaptarakwa Co-operative Society Limited.

I make two-fold conclusions from the foregoing; first that Kaptarakwa Enterprises (1st Plaintiff) and Kaptarakwa Co-operative Society Limited are two distinct and separate entities. Second, Kaptarakwa Enterprises' right of occupation of the premises arises out of a tenancy relationship with Keiyo Housing Co-operative Society Limited, which co-owns the premises with the 4th Defendant.

Clearly therefore, the orders being sought herein would replicate the order of stay granted in the Eldoret Judicial Review Application No. 15 of 2012. The effect of the order granted in this judicial review application was to stay the Judgment of the Business Premises Rent Tribunal. Effectively, what the Applicant(s) are doing is to ventilate one dispute in a multiple of cases and/or suits.

Again, as to whether the orders of stay granted pursuant to leave to file the judicial review implied that the judgment of the Rent Tribunal be stayed or not is a matter of interpretation by the court handling that judicial review application. Therefore, court cannot be moved by way of another suit to purport to interpret those orders.

And more importantly, if I were to grant the orders of injunction sought, I would in effect, be reviewing those orders of stay granted in the judicial review application. This would ultimately amount to a duplication of orders. It is up to the Applicants to move the court in the judicial review application for appropriate orders; either of interpretation of the order of stay or of review or setting aside or appeal against the said orders.

In the same vein the orders granted in the Chief Magistrate's Miscellaneous Application No. 38 of 2012 which maintained the status quo prior to 31st July, 2012 are still in force as the appeal preferred by Ronboy Agencies has not been determined.

**Irreparable Loss/Damage**

Courts have held that **“an interlocutory injunction will not normally be granted unless the applicant can show an irreparable injury which cannot be adequately compensated by damages”** – See **FRANCIS JUMBA ENZIANO & OTHERS -VS- BISHOP PHILIP OKEYO & OTHERS NAIROBI HCCC. NO. 1128 OF 2001 (Unreported)** – Supra.

The Applicant's submissions in this case is that, as a result of the closure of the businesses, they have lost their source of income. Indeed they have pleaded for loss of profits.

However, no specific or estimated cost of this loss has been given. I am not able to find for the Applicants in this respect.

### **Balance of convenience**

Hon. Ringera, J. in **FRANCIS JUMBA ENZIANO CASE (Supra)** said that “**the golden rule in applications for injunctions is to maintain the status quo.**” But this is not applicable in this case because already, there exists the stay order in the judicial review application.

On a balance of convenience, the orders of an injunction do not favour the Applicants because of the mere fact that it would amount to a duplicity of orders.

### **The Preliminary Objection**

I now address myself to the question of the Preliminary Objection raised by the Defendants dated 13th August, 2012. Court gave directions that it be argued alongside this application.

It raises two grounds of objection to the entire suit whereupon, the defence prays that the suit be struck out.

1. The Plaintiff has brought a representative suit with no express authority to bring such suit against the Respondents.
2. The plaint is incompetent as the verifying affidavit accompanying it is defective.

I have appraised myself with the submissions made by both counsel for the respective parties with regard to the Preliminary Objection.

On ground No. 1, the said evidence of authority of the 1st Applicant can only be produced by way of adduction of evidence, as opposed to depositions in an affidavit. And even if I were to find that the authority is lacking, I would only strike out the affidavit sworn without the authority of other members as opposed to having the whole suit struck out.

On the second ground, Order 4 Rule 1 of the Civil Procedure Rules 2010 provides that the plaint shall be accompanied by an affidavit sworn by the Plaintiff verifying the correctness of the averments contained in rule (1) (1) (f), which are that there is no other suit pending, and that there have been no previous proceedings in any court between the Plaintiff and the Defendant over the same subject matter and that the cause of action relates to the Plaintiff named.

The plaint was amended on 21st November, 2012. It is accompanied by a verifying affidavit of John Rutto, the 13th Plaintiff, sworn on 21st November, 2012. He depones that the contents of the plaint have been explained to him by his lawyer and confirms their correctness to the best of his knowledge. That explains basically that the said Verifying Affidavit does not satisfy the requirements set out in Order 4 (1) (1) (f) and (2). But again, the verifying affidavit relates to a suit as opposed to a defective affidavit in support of an application as enunciated in the case of **MUMIAS SUGAR CO. LIMITED -VS- ONIANGO (2005) 1 KLR, 373**. In the latter the application was dismissed because the supporting affidavit was defective. In the instant case, I prefer that such defect be proved by way of evidence, as to strike out the suit at this stage may be a draconian action that may adversely affect the tenets of a fair trial, yet the defect is curable.

I would in the circumstances, not be inclined to strike out the suit, as to do so would be a draconian act that should be exercised sparingly with a lot of caution and exceptions.

See **ARUA MERCANTILE LIMITED -VS- HUMPHREY BABUKIUK & 2 OTHERS 2009 e KLR:-** “**Striking out a pleading is a drastic remedy and it has been held time and again that striking out procedure can only be invoked in plain and obvious cases and that such jurisdiction must be**

**exercised with extreme caution.”**

And should be resorted to as a last option:- **ABDUL RAZAK KHALFAN & ANOTHER -VS- INNACLE TOURS & TRAVEL LTD & ANOTHER (2005) e KLR** “...Striking out pleading is only to be resorted to in respect of plain and obvious cases and that to strike out a pleading or part of a pleading should be the last resort of a court of Law...”

Further in the obiter Judgment of Madan, JA in **DT DOBIE & COMPANY (KENYA) LTD -VS- MUCHINA (1982) KLR, 2**, he held thus:-

**“The power to strike out should be exercised only after the court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge... The court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment, it should not be struck out”.**

From the foregoing it is important that the court focuses on doing substantive justice as opposed to dwelling on technicalities. Focusing on the latter would occasion substantial injustice to the parties, which ideally is not the purpose for presiding over a dispute – See **MICROSOFT CORPORATION - VS- MITSUMI COMPUTER GARAGE LTD (2001) 2 EA. 461.**

**“Rules of procedure are the handmaidens and not the mistress of justice. It would be to elevate form and procedure to a fetish to strike out the suit on account of the defective affidavits.”**

In the circumstances, I dismiss the Preliminary Objection with costs to the Applicants.

**Conclusion**

Having considered the application and submissions made by the respective counsel on record together with the cited case law, I find that the Applicants have not demonstrated a case that merits an injunction to issue against the Respondents. To that extent, prayers (2) and (3) of the application cannot also succeed.

I accordingly dismiss the application with costs to the Respondents.

It is so ordered.

**DATED and DELIVERED at ELDORET this 1<sup>st</sup> day of July, 2013.**

**G. W. NGENYE – MACHARIA**

**JUDGE**

**In the presence of:**

..... for the Plaintiff/Applicants

..... for the Defendants/Respondents