



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO.25 OF 2014

JULIUS MUTHAMIA.....PLAINTIFF/APPLICANT

VERSUS

MARY GACHERI MBAYA1ST DEFENDANT/RESPONDENT

ERIC MBURUGU MBAYA.....2ND DEFENDANT/RESPONDENT

RULING

The Plaintiff has brought a notice of motion application dated 16th January 2014 under section 3A and 60(c) of the Civil Procedure Act and Order 40 Rules 1, 2 and 4 and Order 51 Rule 1 of the Civil Procedure Rules. The Plaintiff seeks the following substantive orders:-

1. That the Defendants by themselves, their employees, servants or agents be prohibited by an injunction order from entering into, trespassing, trading within, remaining in, disposing, wasting or ejecting the Plaintiff's employees, servants or agents or in any other manner dealing with shop no. 1 on the ground floor of LR No. 209/2746 Accra Road, Nairobi, pending the hearing and determination of this suit.
2. That an eviction order do issue against the Defendants and/or their servants and agents to forthwith vacate from the premises known as shop no. 1 located on LR No. 209/2746 ground floor and the OCS Central Police Station to be directed to execute and oversee eviction.
3. That the Defendants be ordered to pay mesne profits to the Plaintiffs for the periods from 1st December 2012 until vacant possession is given.
4. That the Defendants be ordered to pay general damages for trespass to the Plaintiff.
5. That the Defendants be condemned to pay costs of this application.

The application is supported by the Plaintiff's affidavit sworn on 16th January 2014 where he depones that he entered into an informal lease with **Raichiri Investment Company** in 1980 over premises known as shop no. 1 located on LR No. 209/2746, ground floor, Accra Road, Nairobi. The Plaintiff has contended that he operated a business name in the name of Muthamia Mugaine Stores and copies of electricity and water bills as well as a business permit issued in the name of Muthamia Mugaine Stores and Mugaine

Stores respectively have been annexed as evidence.

The Plaintiff avers that he operated the business with his brother, **Mr Japhet Mbaya** (now deceased) until sometimes in the year 2002 when his said brother requested to operate the business alone until 2012 when his children would be through with school. It is the Plaintiff's contention that the premises were to be handed over to him in 2012. While stating that the 1st Defendant is the widow of his late brother, the Plaintiff has avers that her children are now through with school and that he wishes to utilize his lease to the full.

It is the Plaintiff's case that on 14th November 2012, he entered into a fresh lease with the registered owner of suit premises for a period of 5 years and 3 months and a copy of the lease dated 14th November 2012 has been exhibited. The Plaintiff states that in consideration of the lease, he paid and undertook to pay monthly rates in addition to settling utility bills. It is the Plaintiff's averment that although he now intends to utilize the lease, the Defendants continue to trespass and have refused to vacate the premises.

The Plaintiff has alleged that on 11th January 2014, the Defendants forcefully and unlawfully ejected his agent by the name **Nicholus Kimathi Mutuma** from the premises where his stock was left unattended and exposed to theft, loss and damage. While stating that the incident was reported to Central Police Station under OB No. 24/13/1/2014, the Plaintiff has averred that the Defendants are intent on depriving him his rights under the lease agreement dated 14th November 2012 to which they are strangers. It is the Plaintiff's averment that he stands to suffer irreparably together with his family since the business is his only source of livelihood.

The application is opposed by the Defendants through a replying affidavit sworn by the 2nd Defendant on 24th January 2014. The 2nd Defendant avers that the Plaintiff is his maternal uncle and that the business in the suit premises had been operated by his late father **Japhet Mbaya M'Mutungi** since early 1970s until a formal lease was entered into on 1st September 1997. The 2nd Defendant contends that the Plaintiff has never operated the business at the suit premises with their late father as alleged and has contended that the actual settling of the rent dues and trading licences was solely done by his late father.

It is the 2nd Defendant's averment that the business entity under the name Mugaine Stores was registered by his late father on 3rd October 1973 and operated the same as such since then and they were still trading and further, that the Plaintiff cannot purport to have a right over the property merely by virtue of having applied for electricity under the name **Muthamia Muigane** Stores. The 2nd Defendant avers that his father died on 2nd January 2002, and states that the Plaintiff cannot allege that there was an arrangement that he would operate the business until 2012. It is the 2nd Defendant's case that they took possession and running of the business after the demise of their father in 2002 and have been in possession since then.

The Defendants contend that the lease agreement purported to have been issued to the applicant was fraudulent and of no consequences. The 2nd Defendant avers that the Defendants have continued paying rent to Raiciri Investments Company Limited who is the landlord and copies of rent payment receipts dated 30th September 2009, 31st October 2013 and 23rd December 2013 have been annexed as evidence.

According to the Defendants, Kimathi Mutuma was their subtenant who operated an M-pesa Shop under their licence, and that notice to vacate was issued to him in November 2013 whereof he duly vacated in the beginning of January 2014. Lastly, the 2nd Defendant has stated that the Plaintiff resides in Meru and had never operated the business at suit premises and therefore, that he cannot allege that he will be deprived of his livelihood as he did not own and never operated the business.

The application was canvassed by way of written submissions and the Plaintiff filed submissions dated 26th February 2014 where he reiterated the facts of the case and submitted that the principles/conditions established in the case of **Giella –vs- Cassman Brown & Co. Ltd (1973) EA 358** for the grant of an interlocutory injunction must be satisfied before an injunction can issue. It was argued that the Plaintiff

had established a prima facie case with high chances of success since he held a valid lease from the landlord which the Defendants were not parties to and thus had satisfied the condition for grant of injunction.

As to whether the Plaintiff was likely to suffer irreparably if the orders sought were not granted, it was submitted that every business premise is unique in its own way. Further, the Plaintiff contended that he had created a huge number of customers over the years he had carried on business in the premises and that he stood to lose commercial interest gained for over 30 years which could not be assessed in terms of costs. Lastly, it was submitted that the balance of convenience tilted in favour of the Plaintiff who had been operating his business within the suit premises for over 30 years.

The Defendants in submissions dated 3rd April 2014 reiterated the facts of the case and Counsel submitted that the guiding principles for grant of injunctions were settled in the case of **Giella -vs- Cassman Brown** (supra) Counsel for the Defendants submitted that the applicant held a lease obtained fraudulently without disclosing to the landlord that he was not the one operating the business in the name and style of Mugaine Stores.

It is the Defendants' submission that the mere existence of a lease obtained without full disclosure does not give the Plaintiff a good title against the Defendants who were in occupation and were tenants on a month to month basis. It was argued that the business had been operated by the plaintiff's late brother since 1970s until his demise in 2002. The Defendants argued that they took out letters of administration and entered into the suit premises in 2002 from where they had been operating.

In further submission, the Defendants averred that other than the lease, the Plaintiff had not demonstrated that he had expended any capital towards the business and that he had been paying any utilities towards the running of the shop. It was submitted that the Defendants were in occupation, had been running the business and had been paying rent to the landlord. Counsel argued an injunction would affect the running of the business and that the Defendants' and the employees who solely rely on the shop would be rendered jobless. It is the Defendant's submission that the Plaintiff would not suffer any loss and/or prejudice which cannot be compensated by damages should the suit be decided in his favour.

Lastly, it was submitted that the balance of convenience tilts in favour of the Defendants who were in occupation and were running the business whereas the Plaintiff who was not in occupation could await the trial of the case without suffering any damages.

Determination

The issue for determination is whether the Plaintiff has fulfilled the conditions for grant of a temporary injunction as set out in **Giella -vs-Cassman Brown & Co Ltd, (1973) EA 358** and in addition, whether special circumstances have been demonstrated to warrant the grant of a mandatory injunction and/or whether the plaintiff has satisfied the conditions for the grant of a mandatory injunction as established by the Court of Appeal in **Kenya Breweries Ltd and another -vs- Washington Okeyo (2002) 1 E.A. 109.**

The applicant's contention that he is the holder of a lease to the suit premises has been highly contested by the Defendants who have argued that the applicant's lease was obtained fraudulently and have maintained that they are in occupation of the premises. The Defendants have stated they are respectively the wife and son of the late **Japhet Mbaya M'Mutungi** and have been carrying out business in the premises since 1970s. The Defendants contention that they have been in possession since **Japhet Mbaya M'Mutungi** passed away on 2nd January 2002 has not been challenged. The Defendants have provided rent receipts for payments in September, October and December 2013 as well as a business permit valid up to 31st December 2013. They have therefore demonstrated they indeed have been in possession and occupation of the business premises as month to month tenants and hence their interest cannot be ignored.

In my view, the applicant has not proved that he is in possession of the suit premises and has therefore not established a prima facie case. The applicant's contention that he opened a business by the name **Muthamia Mugaine** Stores is not supported by evidence since apart from the electricity bills annexed as

exhibits, the water bill dated 12th January 2002, as well as the business permit for the year 2012 exhibited bears the name Mugaine Stores which the Defendants have argued is their business.

The evidence of the Defendant that they have been carrying on business on the suit premises since taking over from their late father in 2002 has not been challenged. The Defendants have annexed a business permit for the year 2013 issued to Mugaine Store, Licence and medical certificates for employees issued to Mugaine Mini Store by the City Council of Nairobi Public Health Department as well as an advertisement licence from the City Council of Nairobi issued to Mugaine Shop.

The Defendants stand to lose irreparably if the injunction is granted. The balance of convenience lies in favour of the Defendants who are in possession. This is not a clear and plain case in which mandatory injunction can issue. No special circumstances have been established for the court to issue a mandatory injunction as laid down in the case of **Kenya Breweries Ltd and another -vs- Washington Okeyo (2002) 1 E.A. 109**. An order for mesne profits and general damages sought by the applicant can only issue after hearing and determination of the suit. In my view, therefore the plaintiff has not established any prima facie with any probability of success and neither has he demonstrated he would suffer irreparable damage that cannot be compensated by an award in damages. I find no merit in the plaintiff's Notice of Motion dated 16th January 2014 and I order the same dismissed with costs to the Defendants.

Ruling dated, signed and delivered this.....**30th**...day of...**September**.....2014.

J. M. MUTUNGI

JUDGE

In the presence of:

Sarvya for Njenga..... For the Plaintiffs

Muhoro Kimani..... For the Defendants