



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**MISC. CIVIL APPL. NO. 11 OF 2021**

**ENDOROS ENTERPRISES LIMITED.....APPLICANT**

**VERSUS**

**WILD LIVING BUSINESS HUB CO. LTD.....RESPONDENT**

**Coram: Hon. Justice R. Nyakundi**

**Gikandi Ngibuini Advocate for the Applicant**

**Wachira King'ang'ai Advocate for the respondent**

**RULING**

The applicant through a notice of motion dated 6.2.2021 as amended moved the Court for orders:

*(1). That pending the hearing and determination of the appeal, the respondent and its employees, agents and/or servants be restrained through an order of injunction from distressing for rent and from selling or from interfering with the applicant's goods which are the subject of a proclamation dated 26<sup>th</sup> October 2020 issued by the respondent's appointed auctioneer Ms. Ndutumi Auctioneers.*

*(2). That pending the hearing and determination of this application the applicant's goods that were attached and removed by Ndutumi Auctioneers on 5<sup>th</sup> February 2021 be released to the applicant forthwith and the respondent be restrained from interfering in any manner whatsoever with the applicant's peaceful and quiet occupation of the suit property.*

The application is grounded upon the grounds and reasons espoused in the Certificate of urgency, the body of the motion and an affidavit by **Gikandi Ngibuini** dated 6.2.2021 and filed in Court apparently on 5.2.2021. The respondent answer is by way of a replying affidavit of **Antony Maina – Njiru** dated 8.2.2021.

**Applicant's case**

It is averred and captured in the notice of motion and affidavit in support that the applicant and respondent operate under a lease agreement in a premises situated on **plot No. Kilifi/Group/V/280**, in which it trades as **Wild Living Café, Pub Restaurant**. The said lease was executed between both parties on 29.11.2018 for a period of ten years at a monthly rate of Kshs.90,000/=.

Further, that the Corona Virus 19 – pandemic which hit the county in early 2020, has negatively impacted the applicant's business operations rendering closure of all pubs and restaurants in abide to control the spread of the viruses.

*(1). The applicant avers that it blame one of the victims to suffer economic loses due to the corona virus pandemic in Kenya.*

*(2). The applicant's averred that all those circumstances surrounding the impact of corona-virus and business operations.*

*(3). He ran into arrears on rent repayments for the premises due to the lockdown of the business by the government to contain the corona-virus pandemic.*

*(4). That the applicant and respondent held a meeting to renegotiate the terms of the rent payment and that of the outstanding arrears owed to the respondent.*

(5). *That from the meeting the parties agreed to vary the monthly rent payable from Kshs.90,000/= to Kshs.50,000/= from 1.7.2020 – 30.12.2020.*

(6). *Following that discussion the applicant proceeded and effected payment of rent of Kshs.50,000/= for the months of July to December as agreed. Further, in the month of January 2021 the applicant paid the full rent of Kshs.90,000/=.*

(7). *It was the applicant averment that it acknowledges existence of another suit referred as Misc. Application No. 36 of 2020 in furtherance of an objection raised by Varizone Limited and the respondent on sub-lease executed with the applicant, which in the primary lease agreement restricted a sub-leasing of the premises without the consent of Varizone Ltd. It was the applicant contention, that there has been a material non-disclosure and bad-faith on the part of the respondent.*

(8). *The applicant further posited that in the month of 12.6.2020 the respondent issued a notice to distress for rent for the purported arrears of Kshs.569,997.*

(9). *Further, the applicant avers that it was followed with instructions to Ndutumi Auctioneers who attached the applicant's various goods and properties.*

That the said action prompted a Court cause of action in **SPMCC No. E63 of 2020** seeking injunctive orders which on consideration by the Learned trial Magistrate **Hon. J. M. Kituku** dismissed the application on 2.11.2020.

Being aggrieved with the Ruling by the Learned trial Magistrate, the applicant has preferred an appeal therein on the issues to do with distress for rent and subsequent dismissal of an application for injunction against the respondent that forms the epitome of the current application before this Court. Those other complaints made with regard to the order issued in **CMCC No. 34 of 2021** at Mombasa Chief Magistrate Court do not form the main stay of this application.

### **The respondent's case**

The respondent in a rejoinder relied entirely on the replying affidavit dated 8.2.2021 by **Antony Maina Njiru**. He asserted that the injunctive orders would be unjust as they would restrain the applicant from settling the rent arrears to the respondent. That their relationship with the applicant is governed by the lease agreement. That the applicant has not denied owing the rent which became a subject of the distress by **Ndutumi Auctioneers**.

The respondent went on to aver that they have had a series of correspondences and meetings on the terms of the lease and concessions made to operationalize the lease. It was the respondent contention that the applicant had covenanted to sign the addendum as per the attached annexure marked **ANM2**.

As per the respondent averment, despite availing the necessary documents, the applicant failed to sign the addendum which was on account of ongoing arbitration proceedings between the respondent and the head lessor. The respondent contended that the distress was lawful and carried out after the trial Court vacated the injunctive orders.

In addition, the respondent deponed that no tools of trade were carried away by the auctioneer and the applicant remains indebted to date on arrears of the rent payable.

At the hearing of the application, both counsels made brief oral submissions for and against the application as filed by the applicant. Having set out the rival contentions, it is now convenient to consider the application on the facts and applicable legal principles. The point of convergence for such consideration is whether this Court can grant the remedy of injunction which was heard and determined on merit by the Magistrate Court.

### **Determination**

The application raises at the outset short and simple issues for determination.

*(1). First, whether this is an application for injunction under Order 40 Rule 1, 2 & 3 of the Civil Procedure Rules or fairly looked at is an application for stay of execution under Order 42 Rule (6) of the Civil Procedure Rules. If so what is the letter of the applicants notice of motion filed in Court on 5.2.2021.*

*(2). Second, whether the Court has the jurisdiction to grant a remedy of injunction against the respondent, in the first instance, having been considered and determined by the trial Court.*

*(3). Third, in the alternative whether the applicant has met the threshold for stay of execution of the Ruling of Hon. J. M. Kituku determined on 27.1.2021.*

*(4). Fourth, whether, there are any other reliefs that begs the honourable Court to grant the applicant.*

### **Issue No. 1 and 2**

Looking at this application from the perspective of Order 40 Rule 1, 2, & 3 of the Civil Procedure Rules, the applicant is seeking an equitable

remedy to protect his right not to have the proclaimed and attached properties sold by the Auctioneer on behalf of the respondent, otherwise than in exercise of an existing power on distress of rent which has arisen in a proper and lawful manner as provided for in the lease agreement.

The contention by the applicant is that such distress for rent has not arisen by virtue of the negotiations, variations to the rent payable and other terms as stipulated in their correspondences. From the record, it is my view that the trial Court determined an application for injunction based on the well settled principles laid down in **Giella v Cassman Brown & Co. Ltd {1973} EA 358** in light of the facts put before the Learned trial Magistrate, it's my opinion that he acted under the first principle for the applicant to show a prima facie case with the probability of success. That meant that he was not obliged to consider the irreparable harm or the balance of convenience. On what he ruled there was no evidence of a probability of success.

It is apparent from this application therefore; the essence of the injunction is to restrain the respondent from selling or interfering with the applicant's goods under proclamation or attachment. Such arguments raise interesting issues, but they have a tendency to leave many questions unanswered. Thus for example in the case of **Cyo Owaya v George Hannigton Zephania Aduda T/a Aduda Auctioneers & Another {2007} the Court of Appeal** held:

***“Under Section 3 (1) of the Distress for Rent Act, in looking at what constitutes illegality of distress for rent, the Court must not only consider our Laws, but must also consider what in England would be considered an illegality in the levy of distress. An illegal distress is one which is wrongful at the very outset, that to say either where there is no right to distrain or where a wrongful act was committed at the beginning of the levy invalidating all subsequent proceedings.” The following are instances of illegal distress; “A distress by a landlord after he has parted with his reversion; a distress by a person in whom the reversion is not vested; a distress when no rent is in arrears; or for a claim or debt which is not rent; as a payment for the hire of chattels; a distress made after a valid tender of rent has been made; a second distress for the same rent; a distress off the premises or on the highway; a distress in the night that is between sunset and sunrise ..... a distress levied or proceeded with contrary to the Law of Distress. On the other hand, Section 15 of Distress for Rent Act provides thus: “Where distress is made for any kind of rent justly due, and any irregularity or unlawful act is afterwards done by the party distraining, or by his agents the distress itself shall not be therefore deemed to be unlawful nor the party making it be deemed a trespasser ab initio, but the party aggrieved by the unlawful act or irregularity may recover full satisfaction for the special damage he has sustained thereby in a suit for that purpose;”***

***(i). When the plaintiff recovers in that suit, he shall be paid his full costs of suit and have the same remedies for them as in other cases of costs.***

***(ii). No tenant or lessee shall recover in any suit for any such unlawful act of irregularity, if the tender of amends has been made by the party distraining or his agent before the suit is brought.***

The Court will apply this test to the effect that the applicant is not entitled to an injunction.

The situation in this application must not be confused with the decisions of this Court concerning its original jurisdiction under Article 165 (3) (a) of the Constitution. In this application, the applicant has premised the reliefs on the questions to be entertained as an appellate Court. As the main suit might still be pending before the lower Court, it is not incumbent upon the Court to determine the issues ordained in the lease agreement and the efficacy of the terms.

The only valid criticism of the order of the Learned trial Magistrate as of now, which does not swing the scale for the Court to consider the application for injunction a fresh, is the dismissal order issued to grant an injunction that would restrain enforcement of the lease agreement. It is therefore intolerable for the Court to entertain an application under Order 40 Rule 1, 2 & 3 of the Civil Procedure Rules which had already be heard and determined by the Magistrate Court at Kilifi.

On the basis of the provisions of Section 7 of the Civil Procedure Act, the applicant and respondent happened to have litigated in **SPMCC E063 of 2020 at Kilifi Court**, on matters directly and substantially in issue seeking to restrain the respondents from distressing for rent. Without much strain this Court lacks the jurisdiction to hear and determine an application for injunction which the pre-requisite plea of *res judicata* so attaches.

#### **Issue No. 3 and 4**

Whether the application can be allowed under Order 42 Rule 6 of the Civil Procedure Rules. It is clear from Rule 6, there must be an appeal before the Court for it to entertain an application for stay of execution pending an appeal. The language of the applicable order purposes that for the Court to order stay of execution there must be:

***(a). No reasonable delay to file the application.***

***(b). The applicant must demonstrate substantial loss.***

***(c). Sufficient cause to grant the relief.***

***(d). Security for due performance of the decree.***

*(e). The prospects of the appeal being successful so as not to render it nugatory.*

In all, the discretion of the Court to grant stay of execution is unfettered, save that the Court has to consider a criterion of which the interest of justice would demand in navigating to exercise such a discretion. (See also the laid down guidelines in **Stephen Wanjohi v Central Glass Industries Ltd Nairobi Civil Case Number 6726 of 1991, Kenya Steel Ltd v Benjamin Karuga Kabiru {1986} KLR 410, Central Bank of Kenya & another v Uhuru Highway Development Ltd (CA No. 212 of 1999)**). The onus in this regard is on the applicant to show that the application has satisfied the set criteria referred to in Order 42 Rule 6 of the Civil Procedure Rules.

For the application before me there is no dispute that the applicant did file the application without unreasonable delay. That it is also on record that he intends to challenge the Ruling of the trial Court in dismissing an application for injunction. Whether that appeal was to succeed would be rendered nugatory by the refusal of the reliefs on stay of execution is moot. Thus in **Hammond Suddard Solicitors v Agrichem International Holdings Ltd {2001} EWCA Civ 2065 Clarke LJ** opined that:

*“...whether the Court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the Judgment? On the other hand, if a stay is refused and the appeal succeeds, and the Judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?”*

Together with this is the question whether, the applicant stands to suffer substantial loss if for some reasons the goods are sold and money paid to the respondent. In an application for stay, I am also alive to the fact that the subject matter of the applicants intended appeal is the lease agreement which has been in operation since the 29.11.2018. This was the basis the applicant approached the Lower Court to stop distress for rent to protect his rights as designed in the contract. Prior to that as adducted from the affidavits several correspondences were exchanged to perfect the lease in view of the corona-virus 19 pandemic. The story as given by the applicant alleges that he would suffer substantial loss in their trade, if the Ruling of the trial Magistrate is not stayed pending the intended appeal. In **Antoine Ndiaye v African Virtual University, Nairobi Civil Suit No. 422 of 2006** the court stated as follows:

*“So the applicant must show he will be totally ruined in relation to the appeal if he pays over the decretal sum to the respondent. In other words, he will be reduced to a mere explorer in the judicial process if he does what the decree commands him to do without any prospects of recovering his money should the appeal succeed. Therefore, in a money decree, like is the case here, substantial loss lies in the inability of the respondent to refund the decretal sum should the appeal succeed. It matters not the amount involved as long as the respondent cannot pay back. The onus of proving substantial loss and in effect that the respondent cannot repay the decretal sum if the appeal is successful lies with the applicant; follows after the long age legal adage that he who alleges must prove (sic). Real and cogent evidence must be placed before the Court to show that the respondent is not able to refund the decretal sum should the appeal succeed. It is not, therefore, enough for a party to just allege as is the case here that the respondent resides out of Kenya and his means is unknown. This legal burden does not shift to the respondent to prove he is possessed of means to make a refund. Except, however, once the applicant has discharged his legal burden and has adduced such prima facie evidence such that the respondent will fail without calling evidence, the law says that evidential burden has been created on the respondent. And it is only where financial limitation or something of sort is established that the evidential burden is created on the shoulders of the respondent, and he may be called upon to furnish an affidavit of means. See Harlbury’s Law of England on this subject. In my view, substantial loss under Order 42 Rule 6 is not in relation to the size of the amount of the decree or Judgment because however large or small, the Judgment-debtor is liable to pay it. The fact that the decree is of a colossal amount will only be useful material if the applicant shows that the respondent is not able to refund such colossal sum of money; it is not that the respondent should always be a person of straw; the opposite could be true and a respondent may be a lucratively well-endowed person, individual or institution, who is able to refund the colossal sum of money. ....I say all these things because both parties have rights; the applicant to his appeal which includes prospects of success; and the respondent to the fruits of his Judgment and that right should only be restricted or postponed where there is sufficient cause to do so. On the basis of the above, the applicant has not established that substantial loss will occur unless stay of execution is made. The applicant seems to rely more on the success of the appeal to the extent of almost urging the grounds of appeal on immunity. The inquiry for purposes of stay pending appeal under Order 42 Rule 6 of the CPR is not really about the merits of the appeal but rather the loss which will be occasioned by satisfaction of the appeal in the event the appeal succeeds. I have extensively discussed this matter above and I cite the case of Jason Ngumba {2014} eKLR that: .....Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the applicant to do what the Judgment requires, he will become a pious explorer in the judicial process. But what was stated in the case of Absalom Dava vs Tarbo Transporters {2013} eKLR is relevant, that: the discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination. How, therefore, will the Court balance the rights of parties in the circumstances of this case. Despite my findings above, I reckon that the applicant is alive to the fact that even where stay is granted it must be on terms in the form of a security for the due performance of such decree or order as may ultimately be binding on the applicant...” (emphasis added)*

However, in the circumstances of the case, he has not brought himself within the bounds of the principles in (**Oraro & Rachier Advocates v Co-operative Bank of Kenya Ltd (Nairobi CA No. 358 of 1999), Madhu paper International Ltd v Kerr {1985} KLR 840**) and the principles set up above in Ndiaye case.

I fathom and take judicial notice that the current economic constraints brought about by the upsurge of corona-virus 19 pandemic is a global reality. Therefore, that is a knife that cuts on both sides as the respondent has a legitimate expectation to earn some returns for the investment in the said property under lease with the applicant and the would be detrimental to the applicant interest. It is to be remembered that the respondent stands to suffer losses for the unpaid rent which has fallen due and not released by the applicant.

The suffering that Order 42 Rule 6 of the Civil Procedure Rules seeks to remedy is the substantial loss and in my humble view the applicant has failed to discharge the evidential burden for the Court to grant the relief on stay of execution. As regards tools of trade and distress for rent, the Law is settled. In the instant case, the applicant had the opportunity to plead with particularity on the contested goods proclaimed and attached by **Ndutumi Auctioneers** and such an objection to be a subject matter for trial at the Lower Court. The ultimate result ought not to turn on whether the goods attached are those within the exclusion clause or not but on the entirety of the distress for rent.

In a nutshell, the applicant has not made out a strong case for grant of an injunction under Order 40 Rule 1, 2 & 3 and stay of execution pending hearing and determination of the intended appeal in terms of Order 42 (1) (6) of the Civil Procedure Rules. As a corollary and in the alternative and in any event the applicant desires to ventilate the intended appeal he can only do so by depositing of the ascertained amount of rent arrears in a joint earning interest account of both counsels to the suit or with the Deputy Registrar of the High Court within twenty (21) days from today's date. By this declaration, the applicant's distressed goods and chattels are to remain *in situ* the auctioneers yard or as the case may be until expiry of the condition precedent or any other order by this Court.

All in all, the application is misconceived and lacking merit save for the alternative remedy I dismiss it with costs to the respondent.

**Dated Signed and Delivered At Malindi This 23<sup>rd</sup> Day of February 2021**

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**R. NYAKUNDI**

**JUDGE.**

**In the presence of:**

1. Mr. Gikandi advocate for the applicant
2. Mr. Wachira advocate for the respondent