



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 131 OF 2020**

**BERNARD ATANCHA.....APPELLANT/APPLICANT**

**VERSUS**

**KIRICHTWA HEIGHT LIMITED MANAGEMENT BOARD.....1<sup>ST</sup> RESPONDENT**

**KERADEN HOMES MANAGEMENT LIMITED.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The appellant/applicant herein took out the Notice of Motion dated 12<sup>th</sup> March, 2020 and sought for the following orders:

*(i) Spent.*

*(ii) Spent.*

*(iii) THAT a temporary injunction be issued restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondents herein, by their advocates agents, servants or otherwise from stopping of services, harassing, intimidating or in any other way interfering with the applicant's peaceful occupation of the suit premises located at Kirichwa Apartments with respect to units U1 and U8 pending the hearing and determination of the appeal.*

*(iv) THAT the appellant be at liberty to apply for further orders and/or directions as this Honourable Court may deem just to grant.*

*(v) THAT costs of the application be provided for.*

2. The Motion is supported by the grounds set out on its body and the facts stated in the affidavit of the applicant.

3. The applicant asserted that he is the owner of the two apartments situated at Kirichwa Apartments, particularly House No. U1 and U8 ("the suit premises") where he pays a sum of Kshs. 7,500/ per month on service charge and that he previously held the position of Director of Operations with the 1<sup>st</sup> respondent.

4. The applicant asserted that during his tenure in the Board of the 1<sup>st</sup> respondent, he oversaw various projects situated at Kirichwa Apartments which also houses the suit premises and undertook repairs thereon at his own cost under the understanding that his account for the service charge would be credited.

5. It was the averment of the applicant that despite the above understanding, the respondents have refused and/or neglected to credit his account and have placed his name at the gate of the suit premises claiming that he has outstanding debts in respect to service charge and should therefore be denied the relevant services.

6. It is also the averment of the applicant that he previously sought for an order for injunction against the respondents before the trial court and which order was denied, hence the present appeal.

7. The applicant stated that unless the order for an interlocutory injunction is granted at this stage, he stands to continue suffering humiliation and that he is willing to deposit the sum of Kshs. 213,250/ being the service charge sought by the respondents.

8. The 1<sup>st</sup> and 2<sup>nd</sup> respondents resisted the Motion by putting in the replying affidavit of **Edwins Massimba Mukabanah**. In his affidavit, the deponent stated *inter alia*, that by virtue of being a homeowner of the suit premises the applicant was bound by the lease agreement entered into between himself and the 1<sup>st</sup> respondent as well as the relevant by-laws.

9. According to the deponent, the applicant has failed and/or neglected to pay service charge in respect to the suit premises thereby bringing the total outstanding sums at Kshs. 213,250/despite issuance of a demand.

10. The deponent further denied the existence of any agreement between the appellant and the 1<sup>st</sup> respondent whereby it was agreed that the applicant would pay for projects and undertake repairs thereon on behalf of the 1<sup>st</sup> respondent on the condition that his service charge account would thereafter be credited.

11. It was the averment of the deponent that by failing to pay his service charge, the applicant is not entitled to utilize or enjoy the common services unless and until he pays the outstanding sums in full.

12. The applicant rejoined with the supplementary affidavit of **Lydia Muthusi** who asserted that she too is a homeowner at Kirichwa Apartments and that at the material time the applicant together with other homeowners took up the responsibility of undertaking repairs therein and that the money would be credited to their service charge accounts. The deponent further asserted that the applicant had further utilized his personal fund to assist a fellow homeowner in obtaining legal representation and that the funds utilized were to be refunded to him.

13. When the parties appeared before this court for hearing of the Motion, the parties were directed to file written submissions. The applicant submitted that his appeal raises arguable issues since the respondents have admitted that the applicant utilized part of his funds to undertake repairs at Kirichwa Apartments and it is the position of the applicant that the said funds have not been set off.

14. The applicant further submitted that unless the order for an interlocutory injunction sought is granted, he will be denied the services offered in respect to the suit premises and that damages will not constitute adequate compensation. It was also the contention of the applicant that he will continue to suffer humiliation and ridicule from his neighbours.

15. The applicant reiterated his earlier averment that he is ready and willing to deposit the alleged outstanding service charge in the sum of Kshs. 213,250/= in an interest earning account.

16. In response, the respondents through their joint submissions restated their earlier averment that the applicant has not been paying his service charge and that he took it upon himself to avail funds for undertaking repairs and yet he did not adduce any agreement to show authorization to undertake the projects or repairs alleged to have been undertaken.

17. The respondents further restated that the applicant has also failed to adduce any evidence to show the funds allegedly expended towards the projects listed in his Motion and hence he has not proved that he has an arguable appeal with probability of success.

18. It was the contention of the respondents that further to the foregoing, the appellant has not satisfied the principle on irreparable loss since the respondents have managed to show that the suspension of his enjoyment of the service charge is due to the fact that he has defaulted in payment of service charge owing in respect to the suit premises.

19. It was also the contention of the respondents that the balance of convenience therefore tilts in their favour as opposed to that of the appellant. In support of their submissions, the respondents cited the renowned case of **Giella v Cassman Brown & Co. Ltd (1973) EA** which sets out the principles to be met for an interlocutory injunction to be granted.

20. I have taken into consideration the grounds set out on the face of the Motion and the facts deponed in the affidavits in support of and in resistance thereto. I have also considered the contending submissions and authorities relied upon.

21. I note that the Motion was brought under the provisions of **Order 42, Rule 6(2)** of the **Civil Procedure Rules**, which stipulates that:

*“No order for stay of execution shall be made under subrule (1) unless—*

*(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and*

*(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”*

22. It is clear that the foregoing provision relates to a stay of execution. It is also clear that the instant Motion sets out an order for an interlocutory injunction, which is provided for under **Order 40** of the **Civil Procedure Rules**. I wish to point out that the two (2) orders are distinct and in the present circumstances, there is nothing to indicate that there is any order for execution to be stayed. I therefore find that the provisions of Order 42, Rule 6 are inapplicable herein.

23. Having settled the above, it is clear that the application concerns itself with the granting of an interlocutory injunction until such time as the appeal is heard and concluded. The germane principles on interlocutory injunctions originated from the Court of Appeal in East Africa in **Giella v Cassman Brown & Co. Ltd (1973) EA** and are as follows:

*a) The applicant must first establish a prima facie case with a probability of success.*

*b) The applicant must then demonstrate that he, she or it stands to suffer irreparable loss that cannot be adequately compensated through damages.*

*c) Where there is doubt on the above, then the balance of convenience should tilt in favour of the applicant.*

24. In respect to the first principle on whether there exists a prima facie appeal, I considered the averments made by the applicant regarding the factors that the trial court failed to consider, such as the reconciliation of accounts in respect to the service charge account belonging to the applicant; the advance payments allegedly made by the applicant towards repairs and related works at Kirichwa Apartments and whether there are any outstanding service charge arrears in respect to the suit premises. A few of these averments were echoed in the supplementary affidavit of Lydiah Muthusi.

25. I also considered the vehement opposing arguments by the respondent as relates to the arrangements claimed to have been entered into between the parties herein.

26. Without delving into the merits of the appeal at this stage, I am of the view that the issues raised by the applicant in his memorandum of appeal are prima facie arguable and I am satisfied that in seeking to challenge the trial court's decision in that regard, the applicant has satisfied the first principle.

27. On the second principle, the applicant argued in a nutshell that unless an interlocutory injunction is granted, he stands to be denied access to services related to the service charge and that he will continue to suffer humiliation and ridicule from his neighbours. The respondents on their part do not dispute that the applicant has been denied enjoyment of the said services and are of the view that the applicant is not entitled to the same in the absence of payment of the requisite service charges.

28. While I appreciate that the appeal is yet to be heard, I am of the opinion that the applicant has reasonably demonstrated the likelihood of irreparable damage he stands to suffer for which an award of costs may not constitute adequate compensation.

29. Having found in favour of the applicant on the first two (2) principles for the granting of an interlocutory injunction, I am persuaded that the balance of convenience tilts in favour of the applicant.

30. The upshot is that the Motion is allowed as prayed in terms of order (iii) and the following orders are made:

**a) A temporary injunction be and is hereby issued restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondents herein, by their advocates agents, servants or otherwise from stopping of services, harassing, intimidating or in any other way interfering with the applicant's peaceful occupation of the suit premises located at Kirichwa Apartments with respect to units U1 and U8 pending the hearing and determination of the appeal.**

**b) The disputed service charge in the sum of Kshs. 213,250/= allegedly owing to the defendants, be deposited in a joint interest earning account in the names of both Advocates on record for the parties. The said sum be deposited within 30 days from the date of this ruling and to be held in that account until the appeal is heard and determined.**

**c) The applicant to pay the monthly service charge for his two apartments U1 and U8 as and when it falls due for him to continue enjoying the services rendered by the defendants.**

**d) The costs of the application shall abide the outcome of the appeal.**

**Dated, signed and delivered at NAIROBI this 22<sup>nd</sup> day of October, 2020.**

.....

**L.NJUGUNA**

**JUDGE**

**In the presence of:**

.....**for the Appellant/Applicant**

.....**for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents**