REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 52 OF 2020

JAMES GINONO BURURE.....APPLICANT

VERSUS

CHANDRAKANT DEVRAJ SHAH.....1ST RESPONDENT

LEAD PACKAGING LIMITED.....2ND RESPONDENT

RULING

1. By a Motion on Notice dated 4th August, 2020, the applicant/appellant herein, **James Ginono Burure**, seeks that pending hearing of this Application and subsequent Appeal this Honourable court do issue a temporary injunction as against the 1st Respondent, his agents and/or servants or anyone acting in his name from selling, damaging or in any manner waste away the Applicant's goods being one set of LM25-200-1000 Roofing Sheet Forming Machine, one set of LM18-76-988 Roofing Sheet Forming Machine and PPGI Coils (4).

2. According to the applicant, sometime in July 2019 he imported LM25-200-1000 Roofing Sheet Forming Machine, one set of LM18-76-988 Roofing Sheet Forming Machine from China. He then approached his friend, **Mr. Julius Nzioki Kaunda,** who owns a go-down to store his goods. However, upon seizure of the Applicant's goods by the 1st Respondent the Applicant discovered some material fact relevant to this suit that the 1st Respondent rented the said premises to **Mr. Julius Nzioki Kaunda** who trades as the 2nd Respondent. On the 20th June 2020 the Applicant went to pick the said goods from the premises and the said goods packed in motor vehicle KBS 023V ZD 5800.

3. According to the Applicant, the 1st Respondent without any colour or right seized the said motor vehicle together with the Applicant's goods as lien for rent owed by the 2nd Respondent using motor vehicle KBV 468F ZC 4012 to block the exit to the premises. The Applicant lamented that he continues to suffer irreparable loss and damage due to the actions of the 1st Respondent as he is unable to start his business of making roofing sheets that he had already established. On the other hand, it was his view that since the Respondents will suffer no prejudice should the prayers sought be granted, it is only just and fair that the prayers sought in the application herein be granted.

4. In response to the application the 1st Respondent averred that the Applicants allegations are strange to him as he does not know the applicant and he has never given him rental space in the subject premises or anywhere. He only got to know the applicant only when the Applicant filed Civil Suit 449 of 2020 filed at Mavoko Law Courts which application was dismissed through a ruling issued on 24th July, 2020.

5. He asserted that he was the owner of the said Go-Down sitting on his property known as L.R No. 12715/9335 and that he rented out the said premises to the 2nd Respondent by virtue of a lease agreement entered into on 21st March, 2016 at a total monthly rent of Kshs. 400,000.00. He therefore averred that the said **Julius Nzioki Kaunda** did not have any authority to store any 3rd party's goods in his Go-Down without his authority as there was no room to sublet his Go-Down without his prior consent in writing as stated in paragraph 2(i) of the lease.

6. It was deposed that the 2nd Respondent has been trading with said goods and there are reasonable grounds to believe that the 2nd Respondent is the beneficial owner or has beneficial interests in the said goods and cannot now allege that they belong to the applicant while they have been trading with them.

7. The Respondent averred that the averments in the applicant's supporting affidavit are not true since the 2nd Respondent, (his alleged close friend) has confirmed in paragraph 6 of his replying affidavit to the application dated 24th June, 2020 that the applicant was aware of the pending rent arrears owed to the 1st Respondent and the court cases filed in Milimani Chief Magistrate's Court.

8. As far as Go down number 17 and 18 and the goods kept therein are concerned, the Respondent deposed that the Lease Agreement entered into between him and the 2nd Respondent was for a period of 5 years and 3 months starting from 1st April, 2016 to 30th June, 2021 and it has terms and conditions which both the lessor and the lessee were to abide by. However, the 2nd respondent has breached the terms of the said lease agreement by defaulting in rent payment and the same has led to a suit filed at Chief Magistrate Court Nairobi filed by the 2nd respondent when he attempted to levy distress to recover the huge rent arrears currently standing at Kshs. 4, 999, 650.00. Even with the huge rent arrears, the 2nd Respondent deployed tactics to frustrate the process of levying distress for rent by filing a suits and two other applications which have been dismissed by the court.

9. It was disclosed that the said suit filed by the 2nd respondent has not been fully been determined after the Court referred the matter for mediation via court order issued on 18th April, 2019 which is pending determination.

10. According to the Respondent, on 20th June, 2020 he was informed that the 2nd respondent was illegally removing goods from the Go Down without clearing the rent and he stopped and seized the said motor vehicle of Registration Number KBS 023 V ZD 5800 with the goods on it. Based on legal advice, he deposed that for purposes of levying distress for rent, the lessor is entitled under the law to presume that properties kept inside the lessee's premises belong to the lessee, and that the he acted lawfully in stopping the Applicant from taking away goods from the Go down.

11. The Respondent contended that since the 2nd Respondent has declined to honour the lease agreement and has frustrated efforts to levy distress, he was justified in stopping movement of any goods from the Go Downs and he urged this Court to decline the prayers since there are compelling reasons to believe that the 2nd Respondent is using the Applicant herein in playing different tactics to evade clearing the accrued rent. In his view, if the applicant is allowed to remove the said goods, then there will be nothing left in the Go-Down and the same will lead to such a miscarriage of Justice.

Determination

12. The principles guiding the grant of an injunction pending an appeal seems to be the same as those guiding the grant of stay of execution pending an appeal since the Court of Appeal in **Tanui & 4 Others vs. Birech & 11 Others [1991] KLR 510** held while citing **In Re Muge [1991] KLR 51; [1988-92] KAR 205; Githunguri vs. Jimba Credit Corporation Ltd (No. 2) [1988] KLR 838** that the principles on which the Court acts when considering an application for injunction pending appeal are well settled and these are that the applicant must show that the appeal is not frivolous or as it is otherwise put, the applicant must show that he has an arguable appeal and second, the Court must ensure that the appeal, if successful, should not be rendered nugatory. It was therefore held by **Lakha, JA** in **Sun Palm Ltd. & Others vs. Pierre Laporte Ltd. Civil Application No. Nai. 242 OF 1997** that If an applicant can be compensated in damages injunction pending appeal will not be granted as the appeal will not be rendered nugatory. The purpose of granting such relief, it was held by the Court of Appeal in **John Nduati Kariuki T/A Johester Merchants vs. National Bank of Kenya Ltd Civil Application No. Nai. 306 of 2005 [2006] 1 EA 96** is to preserve the *status quo* pending the hearing of the appeal and although the jurisdiction is discretionary, it would however be wrong to grant an injunction where the intended appeal is not arguable or is frivolous or where the refusal to grant the injunction would not render the intended appeal nugatory or where the order of injunction could inflict greater hardship than it would avoid.

13. The Court of Appeal in **Civil Application No.322 of 2018 Nairobi – Oliver Collins Wanyama -vs- Engineers Board of Kenya (eKLR)** therefore held that:

> **"This Court in applications brought under Rule 5(2)(b) exercises jurisdiction similar to that of a court of first instance. It can grant and has on many occasions granted an injunction pending the hearing and determination of an appeal or intended appeal primarily in order to preserve the subject matter of the intended appeal, or where it would facilitate a proportionate resolution of the dispute. *We need only add that, whether the application is for stay of execution, injunction, or stay of further proceedings, the consideration and applicable principles are the same.* To borrow from the passage cited above in Equity Bank Limited V. West Link Mbo Limited, an injunction under Rule 5(2)(b) is designed to empower the Court to entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals."** [Underlining added].

14. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the ***Civil Procedure Rules*** which provides as follows:

> ***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.***

15. In **Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365,** the Court of Appeal held

that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 of the ***Civil Procedure Rules*** is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the ***Civil Procedure Act***, the Court is nolonger limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Act or in the interpretation of any of its provisions. According to section 1A(2) "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

16. It therefore follows that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective. What is expected of the Court is to ensure that the aims and intendment of the overriding objective as stipulated in section 1A as read with section 1B of the ***Civil Procedure Act*** are attained. It is therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.**

17. In this case the applicant filed a rather brief affidavit in support of its application. The said affidavit was a replica of the affidavit filed in support of his application for injunction pending the hearing of the suit before the trial court. In the said affidavit the applicant did not even attempt to bring himself within the ambit of Order 42 of the ***Civil Procedure Rules***. In his submissions, the applicant concentrated on the grounds for grant of an injunction pending trial rather than an appeal. Even then there was no attempt to prove that unless the injunction sought is granted, the applicant stands to suffer substantial or irreparable loss that cannot be compensated by an award of damages. The court was not told that the items the subject of this application are so unique that if disposed of and the appeal succeeds, the Applicant will be disabled from securing the same. Instead the applicant laid emphasis on the hardship that he stands to be exposed to unless the application is granted.

18. However, as the authorities above hold, an injunction pending appeal is only meant to preserve the status quo hence no benefit will accrue to the applicant even if the injunction is granted since the applicant will still be disabled from using the same items.

19. Having considered this application, I am not satisfied that the threshold for grant of the injunction pending an appeal has been met. Accordingly, I find the application unmerited and I hereby dismiss the same with costs.

20. It is so ordered.

Read, signed and delivered in open Court at Machakos this 18th day of November, 2020.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ochanda for Miss Rotich for the 1st Respondent

Mr Chacha Matiku for Mr Okonji for the Applicant

CA Geoffrey