



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 124 OF 2020

BIRGI ENTRPIRSES LIMITED1ST APPELLANT

KINYUA & CO. AUCTIONEERS2ND APPELLANT

VERSUS

DOBS ENTERTAINMENT LIMITED.....RESPONDENT

R U L I N G

1. On the 4/9/2020 the appellant did, contemporaneously with the Memorandum of appeal, file a notice of motion seeking orders that:-
 - i. **That the respondent does within Seven (7) days give security for the appellant's costs to be satisfaction of this Honourable court.**
 - ii. **That the respondent does deposit in this Honourable court within seven (7) days all outstanding monthly rent inclusive of VAT and any annual increases effective therein from February, 2020 to September, 2020 under the lease agreement dated 6th April 2018.**
 - iii. **That the respondent does deposit in this Honourable court within seven (&) days all outstanding annual increment sums of monthly rent from April 2019 to January, 2020 under the lease agreement dated 6th April 2018.**
 - iv. **That the respondent does deposit in this Honourable court within seven (7) days any subsequent monthly rents inclusive of VAT at such time as they will accrue after September, 2020 under the lease agreement dated 6th April 2018 during the pendency of this appeal.**
 - v. **That the respondent does deposit in this Honourable court outstanding monthly rent inclusive of VAT and any annual increase applicable therein from February, 2020 to May 2020 under the terminated lease agreement dated 20th February, 2019.**
 - vi. **That the respondent does deposit in this Honourable court outstanding annual increment sums of monthly rent from February, 2020 to May 2020 under the terminated lease agreement dated 20th February, 2019.**
 - vii. **That the costs of this application be in the cause.**
2. That motion was expressed to be brought pursuant to the provisions of section 3A as well as order 26 of the Civil Procedure Act and supported by the affidavit sworn by one BHUPINDER SINGH BIRGI. The gist of the grounds of the application and the affidavit are that there had always been a tenancy agreement between the parties over portions of a property known as BIRGI COMPLEX at an agreed monthly reserved rent, which obligation to pay rent the respondent had defaulted to meet well before the onset of the COVID 19 pandemic and by March 2020 there was outstanding rent arrears in the sum of Kshs. 2,105,425./= which the appellant sought to recover but the respondent filed the lower court suit seeking protection on the basis that his failure to pay rent was occasioned by the pandemic and the resultant government directive to close bars and entertainment joints. That basis of the suit is deemed and termed dishonest, intended to mislead the court when there was no material to demonstrate payment of the rent due before March 2020 resulting in the arrears and that even after the government restrictions had been eased, no payments was made while the respondent continued in possession, notices of termination having been served notwithstanding.
3. In addition the appellant asserts that in addition to the rents being withheld it has been forced to pay taxes due on such rents every time an

invoice is raised and had done so up to May 2020. For those reasons the appellant prays that the respondent provides security for the appellant's costs of the appeal to the satisfaction of the court and to avail and deposit into court all rent arrears in the aggregate sum of Kshs. 2,105,425.

4. The affidavit in support of the application exhibited copies of the press releases by the ministry of Health as well as the lease agreements and the tax invoices together with receipts paid on account of the tenancies among some 13 documents. There was also a further affidavit by the same deponent whose gist was to respond to the replying affidavit.

5. When served the respondent filed a replying affidavit sworn by its General Manager, SAMSON MGANGA KIMWAGA whose gist was to admit the particulars of the tenancies while insisting that the respondent had always observed the terms of the tenancy till the pandemic struck with the attendant government restrictions on its business and operations thus disabling it from ability to pay rent and thus clause 5 of the lease was invited to suspend the performance of the terms of the lease by the respondent.

6. The appellant was then faulted for ignoring the clause in the lease by demanding the rent said to be in arrears together with debt collection unreasonably which demand was then disputed but the appellant persisted on its demand and then sought to levy distress upon the respondent movable assets with a threat to reentry. It was then contended that the distress was pursued against the respondent's tools of trade which the respondent deemed unlawful from which reason it approached the lower court and was duly granted orders of injunction pending determination of the suit.

7. The respondent then attacked the orders issued herein on the 4/9/2020 for being highly irregular for having been grounded and premised upon falsehood including the allegation that there was an alleged registered lease which was in fact not registered. It was also asserted that the lease dated 20/2/2019 had been terminated which was not true and that ordering the payment of the arrears of rent amounts to condemning it unheard and thus abusing the court process. For such reason the respondent sought that the application be heard on priority basis and the ex-parte orders of 24/9/2020 set aside.

8. The respondent equally filed a notice of motion dated 28/9/2020 on 29/9/2020 primarily seeking the setting aside of the orders 24/9/2020 and for an order that the appellants advocate, Janet Milongo be cross examined on her affidavit sworn on the 4/9/2020 in support of the application to be heard during vacation.

9. That application was opposed by the grounds of opposition dated 30/9/2020 whose thrust was that the respondent was in contempt of the court orders of 4/9/2020 and deserved not being heard by the court prior to purging that contempt and further that the orders of 4/9/2020 occasions no prejudice to the respondent owing to the legal obligation to pay covenanted rents. It was lastly contended that the prayer to cross examine the counsel for the appellant was merely calculated to embarrass the counsel since the application the affidavit was sworn to support had been dealt with and therefore such request had been overtaken by events.

10. When counsel appeared in court on the 30/7/2020, directions were given that the two applications be heard together and by way of parties filing composite written submissions regarding the two applications. Pursuant to such orders the appellant filed its submissions on the 15/10/2020 while the respondent did so on the 15/10/2020.

11. I have had the benefit of reading the two sets of submissions and in my view I will consider the respondent's application to be an opposition to that by the appellant. I do take this position on the basis that whatever decision I make on the appellant's application will impact of the respondent's application. If I disallow the appellant's application, the respondent's shall have succeeded, and vice versa. Accordingly, then, this determination will seek to answer the question whether the appellant is entitled to the orders it seeks for provision of security and deposit of the subject arrears of rent. In framing that question I have appreciated the fact that even though the prayers are five, all amount to request for deposit of costs and arrears of rent.

12. As said before I deem the respondent's application as an opposition to the appellant's application by which design therefore the question to ask is whether the appellant is entitled to an order for security for costs and deposit of the arrears for rent. In making a determination of that question the court shall stand reminded that this is an interlocutory determination and it ought to hesitate from making determinative findings as to be capable of pre-empting or embarrassing the hearing of the appeal at a later date. I will thus refrain from delving into the merits of the decision granting injunction leaving same for the determination of the appeal on the merits. [1] In *Olive Mwihaki Mugenda & another v Okiya Omtata Okoiti & 4 others [2016] eKLR* the court of appeal commented in reiterating the restraint to observed by court as follows; -

“We remind ourselves that this is an appeal arising from an interlocutory ruling. The judgment on the main amended Petition is pending before the trial court and is scheduled for delivery on 6th April 2016. In this appeal, unless it is absolutely necessary, we shall restrain ourselves from making any findings or pronouncements and determinations that would pre-empt the judgment of the trial court in the Petition”.

Security for costs.

13. The request for costs is premised and founded upon the provisions of order 26. That legislation at Rule 1 provides:-

“In any suit the court may order that security for the whole or any part of the costs of any defendant or third of subsequent party be given by any other party”.

14. I don't doubt that under section 3 of the civil procedure Act an appeal being a civil litigation is indeed a suit. I also read and understand Order 26 rule 1 to not to limit that security for costs can only be ordered to secure the costs of a defendant, a third party or a subsequent party. One ought not interpret or understand the legislation not to permit that the person bringing the suit himself seeks security of its costs

against the person sued. Order 26 must be viewed to find its foundation upon those provisions of Section 63 of the Act which itself provides:-

“In order to prevent the ends of justice from being detected, the court may if it is so prescribed:-

a.

b. Direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the court or order the attachment of any property...”

15. A reading of both Act and the Rule inform me that indeed any party to a civil litigation is amenable to seek to be given an order for security of its costs. I thus do find that the appellant was entirely within the law to bring and pursue the application.

The next question is whether the appellant has met its threshold to succeed in the application. In *Gatirau Peter Munya vs Dickson Mwenda Kithinji (2014) eKLR* the court of appeal set the obligations for applicant in the following words:-

“In an application for security for costs, the applicant ought to establish that the respondent, if unsuccessful in the proceedings, would be unable to pay the costs due to poverty. It is not enough to allege that a respondent will be unable to pay the costs in the event that he is unsuccessful. The same must be proven.”

16. Earlier on the same court had in *Macro tools and explosives Ltd vs Murujee Brothers Ltd (1988) KLR 730* had established the position that onus is on the applicant to prove such inability or lack of good faith that would make an order for security for costs reasonable.

17. The rationale for ordering security for costs is that a party who succeeds in litigation is not left without recompense while he who has little financial means or just bad faith is not permitted to drag his opponent in the litigation indefinitely without offering a sense of assurance on any costs that may be adjudged against him. In other words, the order for security ensures that a litigant be protected from vexatious without a measure of security towards recovery of his costs thereby incurred. *See also Noor Mohamed Abdulla vs Ranchhodbhal J. Patel (1962) EA 448.*

18. When I apply those principles as are applicable to the facts and circumstances of this case, I note that the applicant’s complaint is that the respondent has been unable to pay the covenanted periodic rents an assertion the respondent doesn’t deny whole but says that his inability has been occasioned by the pandemic and the ensuing government restrictions on its business undertakings. While I restrain myself from comments on the merits of reasons for default to pay, I do find that it is common ground that there has been demonstrated inability to pay rent and therefore it would have been a good ground to explain that failure otherwise by financial difficulties. I am therefore satisfied that inability to pay rent having not been explained otherwise the respondent would, should it be unsuccessful in this litigation, be unable to pay costs and I therefore order that it deposits security for costs in the sum of Kshs. 300,000 within 30 days from the date of this ruling.

Deposits of the Outstanding Rent

19. In determining this prayer, I will steer away from any comments on the merits of the claims both here and at trial that may have the effect of embarrassing or pre-empting the fair hearing of the appeal and the suit pending before trial court. I will thus seek to find out if the request for deposit is justifiable or indeed reasonable.

20. That there exists a tenancy between the parties is not in dispute. What appears to be in dispute is whether the circumstances brought about by the pandemic did fit into the parties’ contemplation at the time of entering into the lease agreement and had thus relieved the respondent from paying rent and whether such relief was permanent and in perpetuity or the same was temporary and subject to remedy upon the circumstances changed. In deed a determinative expression on the said issue must be avoided to preserve the fair hearing of the appeal and the pending suit but it is enough to say that some of the invoices for rent were rendered prior to 15th March 2020 and the pendency of payment of such invoices on due dates cannot be attributable to the pandemic.

21. In addition the suit in which the trial court granted an order of injunction doesn’t appear to seriously contest the fact that rents outstanding in arrears but was grounded on the fact that the distress was sought against goods immune from distress by virtue of Distress for Rent Act.

22. In those circumstances and while the accuracy and quantum of such actual arrears will have to be determined at trial, the orders sought is not for payment of the said sum to the appellant but rather deposit into court such arrears of rent. I read the prayer to merely insist that the respondent ought not to be allowed to continue occupying the appellant’s premises without paying rent and without demonstrating ability to pay such rents by deposit of the arrears and the due rents as and when they accrue.

23. When such circumstances get revealed, the overriding objective of the court and its inherent powers dictate that such sum be availed at the disposal of the court and that of the parties so that at the conclusion of the matter the person adjudged as entitled is not thrown to the difficulty of having to incur additional costs to secure its entitlement.

24. I therefore find that the request for deposit of rent is justifiable and reasonable as a way of meeting the ends of justice. I therefore direct and order that the respondent shall within 30 days from today deposits the sums disclosed at ground 32(b) (c) and (e) of the Notice of Motion together with rents that have and shall fall due on account of the tenancies between the parties from the month September, 2020, pending the hearing and determination of the appeal. This determination allowing the appellants application concomitantly dismisses the respondents motion dated 28/9/2020.

25. I order that the costs of the two applications shall abide the outcome of the appeal.

Dated, signed and delivered online by MS TEAMS,

this 17th day of **November 2020.**

P.J.O. OTIENO

JUDGE