



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 575 OF 2018

BANK OF AFRICA KENYA LTD.....APPELLANT

VERSUS

POPATRAL MADHAVJI & BROS LTD.....RESPONDENT

RULING

INTRODUCTION

1. The Appellant's Notice of Motion application dated 4th December 2018 and filed on same date was brought pursuant to the provisions of Sections 1A,1B & 3A of the Civil Procedure Act, Order 42 Rule 6(6), Order 51 Rule 1 of the Civil Procedure Rules, 2010. Prayer No 1 and 2 were spent. It sought the following remaining orders:-

1. Spent

2. Spent

3. That the Honourable Court be pleased to issue a temporary injunction restraining the Respondent, its servants and/or agents S.K. Karuu t/a Kiriiyu Merchants Auctioneers from attaching, seizing or attaching, levying distress or in any other manner interfering with the property of the Appellant pending the *inter partes* hearing and determination of this Appeal.

4. That prayers 3 and 4 above be enforced by the Officer Commanding Central Police Station, Nairobi.

2. The Respondent's Preliminary Objection dated 22nd January 2019 was filed on 23rd January, 2019.

3. On 24th January 2019, this court directed that both the Appellant's and Respondent's aforesaid application and Preliminary Objection respectively would be heard together.

4. The Appellant's Written Submissions were dated 6th January 2019 and filed on 7th February 2019 while those of the Respondent were dated 2nd April 2019 and filed on 3rd April 2019.

5. Parties asked this court to deliver its decision based on the Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

THE APPELLANT'S CASE

6. The Appellant's present application was supported by the affidavit of its Project Officer – Administration Department, Godwin Okinyi Otieno that was sworn on 4th December 2018. He also swore a Supplementary Affidavit on 7th February 2019. The same was filed on even date.

7. It averred that on 8th May 2014, it entered into a lease (hereinafter referred to as "the Lease") with Respondent for lease of office space erected on LR Number 209/2527/1 situated along Monrovia Street, Nairobi (hereinafter referred to as "the premises"). The Lease provided that the same could be terminated upon either party issuing the other a reasonable termination of the same.

8. It stated that on 16th February 2017, it noted that it could not continue leasing the premises due to economic circumstances prevailing in

the country. It engaged the Respondent with a view to surrendering and/or terminating the lease and on 24th November 2017, it issued the Respondent with a Termination Notice that was to take effect on 1st December 2017, with the lease terminating on 31st May 2018.

9. It contended that it was unable to restore the premises to a good and tenable state because the Respondent declined to give its approval from Nairobi City Council Department for it to undertake the said works.

10. It asserted that while serving the Termination Notice, it sought and obtained at its own costs, an alternative tenant to take over the premises but that the Respondent failed, refused and/or neglected to engage the said tenant.

11. It pointed out that it settled all its rent obligations as set out in the Lease and was emphatic that there were no arrears up to 31st May 2018 when the Lease terminated and consequently, it became automatically discharged from all obligations and liability under the said Lease.

12. It said that it was surprised when it was served with a demand letter from the Respondent demanding quarterly rent alleged by one (1) month overdue. It stated that it also received threats from the Respondent about auctioneers being instructed to levy distress which led it to file an application in the lower court seeking to restrain the Respondent from levying illegal distress for rent.

13. However, the said application was dismissed. The Applicant stated that it was aggrieved by the decision of the Learned Magistrate hence the need to file the present application. It further sought to restrain M/S S.K. Karuu t/a Kiriuyu Merchants Auctioneers from illegally distressing for rent.

14. It explained that it had not been at the premises from 31st May 2018 which was why the Respondent was levying distress of rent in its headquarters and not on the leased premises. It termed the distress illegal *ab initio* as the same attempted to distress rent on different premises other than the leased premises.

15. It asserted that it was willing to deposit such reasonable security in court or in joint interest account for the performance of any orders which would be ultimately be imposed on it.

16. It stated that the present application was filed timeously and that if the orders it had sought were not granted, it would render the appeal herein nugatory as its operations would be paralysed leading to loss of colossal amounts of money and confidential documents belonging to its customers.

17. It was emphatic that the court had power to grant an injunction pending the hearing and determination of the Appeal and thus urged this court to allow its application.

THE RESPONDENT'S CASE

18. In addition to its Preliminary Objection, the Respondent filed a Replying Affidavit in opposition to the present application. It was sworn by its Operations Director, Chandresh Raithatha on 21st January 2019. It was filed on 22nd January 2019.

19. It faulted the Affidavit of Godwin Okinyi Otieno who it said had no capacity to swear the same on the ground that he was neither a director nor the legal officer of the Appellant and further that he had not annexed any authority to enable him act on behalf of the Appellant herein. It termed the said Affidavit as having been incompetent and null and void which only lent to the dismissal of the said application with costs.

20. It was categorical that there was no express term or condition for termination of the lease before its expiry and consequently, the lease could not be surrendered. It was emphatic that the Termination Notice that was purportedly issued by the Appellant taking effect on 1st December 2018 was void *ab initio*.

21. It added that it was not aware of any tenant who had been sourced by the Appellant and that in any event the Appellant was under no obligation to source for a tenant. It contended that the Appellant was still in possession of the premises and hence rent was payable because it could not continue occupying the premises without paying rent.

22. It averred that its instructions to the auctioneers to levy distress for rent was legally issued and the Appellant was obliged to settle the auctioneers' fees in the sum of Kshs 1,006,800/=. It urged this court to direct that the Appellant to deposit the rent owing until termination of the lease on 14th July 2019 amounting to Kshs 14,647,351.50, the sum of Kshs 5,071,100/= being the restoration of the suit property and the auctioneers' charges in the sum of Kshs 1,006,822/=. It also pointed out that the Appellant never complied with the court order to deposit a sum of Kshs 8,263,126.79.

23. It further contended that the Applicant could not purport to seek an injunction in this court when a similar application had been dismissed by the lower court. This was the gist of its Preliminary Objection.

24. It averred that the Appellant would not suffer any loss that could not be remedied by an award of damages and thus urged this court to dismiss the Appellant's present application.

LEGAL ANALYSIS

25. Right at the outset, this court wishes to state that the Appellant deposited the sum of Kshs 8,264,626.75 on 20th December 2018 as was

directed by Thuranira Jaden J on 4th December 2018 when she granted a temporary injunction restraining the Respondents, its servants and/or agent S.K. Karuu t/a Kiriuyu Merchants Auctioneers from attaching, seizing or attaching, levying distress or in any other manner interfering with the property of the Appellant pending the *inter partes* hearing and determination of this Application.

26. The Respondents argument that the Appellant had not deposited the said amount was therefore not correct. They may have arrived at that conclusion because the Appellant may have failed to notify it when it deposited in court.

27. Turning to the substantive matter, this court determined that the issues that had been placed before it for determination were:-

- 1. Whether or not the Affidavit of Godwin Okinyi Otieno was defective.**
- 2. Whether or not the court could grant an injunction pending hearing and determination of the appeal?**
- 3. Whether or not the Appellant had met the test so as to be granted an order for injunction pending the hearing and determination of its Appeal.**

28. The court therefore dealt with the issues under separate and distinct heads.

I. COMPETENCE OF THE APPELLANT'S APPLICATION

29. The Respondent had argued that the Appellant's application was incompetent *ab initio* for the reason that Godwin Okinyi Otieno was neither the Appellant's director nor its legal officer and that he had not annexed an authority to act on its behalf.

30. The Appellant submitted that the said Godwin Okinyi Otieno had in Paragraph 1 of his Supporting Affidavit indicated that he had the authority to swear the said affidavit on its behalf and that in any event, he had annexed to his Supplementary Affidavit, a copy of a Power of Attorney authorising him to swear the Affidavit on its behalf.

31. It further submitted that even if an action had been commenced without authority, the defect did not go to the jurisdiction of the court as it was curable as had been held by Sewe J in **Feeraj General Trading & Contracting Co Ltd Kenya & Another vs Mumias Sugar Co Ltd [2016] eKLR**.

32. This court entirely associated itself with the holding of Sewe J. Although not all technicalities are curable, Article 159 (2) (d) of Constitution of Kenya, 2010 does come into play to avoid cases being dismissed on procedural technicalities that do not go to the root of the matter for the attainment of the ends of justice and to prevent abuse of court processes.

33. The above notwithstanding, this court took the view that at the appellate stage, the court was not called upon and/or required to enquire whether or not a deponent had authority to swear an affidavit in support of an application because such objection fell within the mandate of the trial court to determine if a suit was competent on account of an authority not having been filed at the time the suit was lodged in court. An appeal is merely an extension of the original cause of action that had been filed in the trial court.

34. The requirements for filing an appeal are distinct from the requirements of filing suit. In Order 4 Rule 1(4) of Civil Procedure Rules, it is stipulated that:-

"...Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so."

35. There is no requirement that any authority must be attached to the Memorandum of Appeal and/or Record of Appeal as a condition precedent to prosecution of the appeal, unless of course such authority was part of the documents contemplated to be filed under Order 42 Rule 13 (4) of Civil Procedure Rules.

36. At the appellate stage, the following documents must be placed before the High Court as stipulated in Order 42 Rule 13 (4) of the Civil Procedure Rules:-

- (a) the memorandum of appeal;**
- (b) the pleadings;**
- (c) the notes of the trial magistrate made at her hearing;**
- (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing.**
- (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;**
- (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:**

Provided that –

(i) a translation into English shall be provided of any document not in that language;

(ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f)

37. It was therefore the considered view of this court that the Respondent's assertions that the present application was incompetent *ab initio* fell by the wayside. The proper forum for it to have raised the said issue would have been at the trial court but not at the appellate court, unless of course, the issue had been addressed by the trial court and the same was before the appellate court for determination. The provisions of Section 34 and 243 of the companies Act 2015 were not relevant in the circumstances of the case herein.

II. WHETHER THE APPELLANT'S APPLICATION WAS RES JUDICATA

38. The Respondent submitted that the present application was *res judicata* because the Applicant had made a similar application for a temporary injunction in the lower court and that the same had been dismissed.

39. It relied on the provisions of Section 7 of the Civil Procedure Act Cap 21 (Laws of Kenya) and the case of **Independent and Electoral Boundaries Commission vs Maina Kiai & 5 others [2017] eKLR** where the issue of *res judicata* was addressed.

40. On its part, the Appellant argued that it had filed its application pursuant to the provisions of Order 42 Rule 6(6) of the Civil Procedure Rules as read together with Sections 1A, 1B and 3A of the Civil Procedure Act and that an appellate court could grant an injunction pending the hearing and determination of an appeal. It placed reliance on the case of **Patrick Kalava Kulamba & Another vs Philip Kamosu & Another [2016] eKLR** to buttress its argument. It therefore termed the Respondent's Preliminary Object as misconceived.

41. Section 7 of the Civil Procedure Act stipulates as follows:-

“...No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

42. The understanding of this court was that a suit or appeal between the same parties and with an issue substantially that had been heard and determined between the same parties could not be heard afresh because litigation has to come to an end. However, the principle of *res judicata* would not be applicable where a matter was being appealed from because appeal is a lawful process to a higher court when a party has been aggrieved by the decision of a lower court. If that were not so, then all appeals would be deemed to be *res judicata* which would be an erroneous interpretation of the law.

43. The Respondent's reliance on the case of **Independent and Electoral Boundaries Commission vs Maina Kiai & 5 others** (supra) was therefore not relevant in the circumstances of this case.

44. On the other hand, this court agreed with the Appellant's submissions that the High Court had power to grant an injunction pending the hearing and determination of an appeal. This is because when an application for injunction in a lower court is dismissed, the only remedy that is open to an aggrieved party is for him to seek an injunction from the appellate court for the reason that the dismissal of such an application would be a negative order. A prayer for a stay of execution pending hearing and determination of the appeal cannot therefore be granted in such an instance because there would be no execution to stay.

45. Notably, Order 42 Rule 6(6) of the Civil Procedure Rule under which the Appellant's application was premised stipulates that:-

“Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

46. The Appellant filed its Memorandum of Appeal within the stipulated period of thirty (30) days from the date when the decision of the Learned Magistrate was made. This was in compliance with Section 79G of the Civil Procedure Act and Order 42 Rule (1)(1) of the Civil Procedure Rules.

47. In this regard, this court fully associated itself with the holding of Visram J (as he then was) in the case of **Patrick Kalava Kulamba & Another vs Phillip Kamosu & Another** (Supra) that an injunction could be granted pending the hearing and determination of the Appeal.

48. Accordingly, this court found and held that the Respondent's submission that the Appellant's application was *res judicata* was misconceived and that the same lacked merit.

III. WHETHER AN ORDER FOR INJUNCTION COULD BE GRANTED PENDING APPEAL

50. The Appellant argued that its appeal was arguable. It pointed out that it issued a six (6) months' Termination Notice, it paid all its rent obligations until 31st May 2018, it sought an alternative tenant at its own cost and introduced him to the Respondent and that it commenced the process of restoration of the premises.

51. It placed reliance on the case of Bashratil vs Allela LLR No 5153 (CAK) where the Court of Appeal held that fixed term leases with no exit clauses could be terminated by issuance of reasonable notice.

52. It also relied on the case of C.Y.O Owayo vs George Hannington Zephania Aduda t/a Aduda Auctioneers & Another [2007] eKLR where it was held that under Section 5 of the Distress for Rent Act, distress could only be made during possession of premises by a tenant.

53. On the other hand, the Respondent submitted that the Appellant had not established a *prima facie* with probability of success because the lease it had entered into with it being a registered lease, was incapable of termination before the expiry of the lease.

54. It added that the Appellant was not entitled to the equitable relief because its hands were dirty. It pointed out that the Appellant had continued to keep the premises under lock and key while not paying rent.

55. It relied on the case of Sarah Jelangat Siele vs Commissioner of Lands & 3 Others [2013] eKLR and Siteyia vs Gitome & 3 Others [2013] eKLR to buttress its argument that the Appellant was seeking to obtain a mandatory injunction by seeking to abrogating the binding terms of the lease and being in breach by failing to pay rent.

56. It referred this court to the case of Triton Service Stations Ltd vs Pip Holdings Ltd [2009] eKLR where it was held that a mandatory injunction could not be granted on an interlocutory injunction in the absence of special circumstances.

57. It argued that the lease between it and the Appellant was a lease registered under the provisions of the Registration of Titles Act (Repealed) and the Land Act did not envisage the giving of Notice in a registered Lease drawn for a period of five (5) years and hence, terms of the lease were binding upon the parties.

58. It placed reliance on the cases of Garibi Ltd vs Ogilvy East Africa Ltd [2014] eKLR, Ukwala Supermarket [Eldoret] Ltd vs Amritral Sojpar Shah Wholesalers Ltd [2017] eKLR and Bachelor's Bakery Ltd vs Westlands Securities Ltd [1982] eKLR to buttress its argument.

59. It further relied on the case of Chimatel Meghji Naya Shah & Another vs Oxford University Press [EA] Ltd [2007] eKLR where it was held that if a lease provided for a fixed period and the tenant was unable to pay the rent, the situation that obtained was a breach of contract.

60. It pointed and that since the Appellant was the author of the legal dispute, it was unlikely that it would restore the premises and thus claimed a sum of Kshs 5,071,000/= to enable it restore the premises itself.

61. This court carefully considered this matter and determined that the issues that had been raised by both parties went into the root of the Appeal. What it was called to do at this point, however, was to establish if the Appellant had met the test in the case of Giella vs Cassman Brown Ltd [1973] EA 358 so as to be granted a temporary injunction pending the hearing and determination of the Appeal. The test in the said case was to establish:-

a. whether an applicant had established a *prima facie* with a probability of success;

b. where such an applicant would suffer irreparable harm if the relief was denied;

c. if the court was in doubt, it was called upon to grant an interlocutory injunction on a balance of convenience.

62. This was clearly a case of one party's word against the other. There was the question whether the Appellant could terminate the lease before expiry of the lease and the consequences thereof that had to be determined. In view of the two (2) diametrically opposing positions that were taken by the parties herein, this court could not state with certainty if the Appellant had established a *prima facie* case with a probability of success.

63. This court was also not convinced that the Appellant would suffer irreparable loss if the interlocutory injunction was not granted for the reason that it had since moved out of the premises. Notably, the dispute related to a pecuniary claim that could be compensated by way of damages.

64. However, it was satisfied that there were several weighty issues that had been raised by the parties that would be best determined during the Appeal. Having considered the parties' Written Submissions, the case law that they both relied upon and the circumstances of the case herein, this court came to the firm conclusion that the balance of convenience tilted in favour of the Appellant being granted an injunction pending the hearing and determination of the Appeal herein. This is to avoid the challenges that would arise if distress for rent proceeded while the Appeal was awaiting hearing and determination with costs to the Appellant.

DISPOSITION

65. For the foregoing reasons, the upshot of this court's decision was that the Respondent's Preliminary Objection dated 22nd January 2019 and filed on 23rd January 2019 was not merited and the same is hereby dismissed with costs to the Appellant.

66. This court found the Appellant's Notice of Motion application dated and filed on 4th December 2018 to have been merited and the same is hereby granted in terms of Prayer No (3) therein. Costs of the said application will be in the cause.

67. As the Appellant had already deposited a sum of Kshs 8,263,126.75 into court, being rent until May 2018, this court will not order that it deposits further rent pending the hearing and determination of the Appeal herein. However, the Appellant is hereby directed to deposit into court a further sum of Kshs 3,000,000/= to stand in for restoration of the premises in a tenantable condition pending the hearing and determination of the Appeal herein.

68. It is so ordered.

DATED and DELIVERED at NAIROBI this 31st day of July 2019

J. KAMAU

JUDGE