



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 470 OF 2019**

**JELIOTH WAMBUI THEURI.....APPELLANT/APPLICANT**

**-VERSUS-**

**STANLEY OMONDI.....1<sup>ST</sup> RESPONDENT**

**CAROLYNE OUKO.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The plaintiff/applicant herein took out the Notice of Motion dated 14<sup>th</sup> August, 2019 in which she sought for the orders hereunder:
  - (i) *Spent.*
  - (ii) *Spent.*
  - (iii) ***THAT the respondents together with their servants and/or agents be and are hereby restrained jointly and severally by an order of temporary injunction from evicting, leasing, transferring, trespassing on and/or in any other way interfering with the applicant's tenancy and occupation of the premises known as House No. 3000109 Mariakani Estate within Nairobi County pending the hearing and determination of the intended appeal.***
  - (iv) ***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. In opposing the Motion, the 1<sup>st</sup> respondent swore a replying affidavit on 6<sup>th</sup> September, 2019 on his behalf and on behalf of the 2<sup>nd</sup> respondent.
4. This court gave directions to the parties to put in written submissions on the application.
5. I have taken into consideration the grounds set out on the face of the Motion and the facts deponed in the affidavits filed in support of and in resistance thereto. I have also considered the contending submissions before me.
6. A background of the matter in brief is that the applicant instituted Chief Magistrate's Civil Case No. 4058 OF 2018 vide the plaint dated 27<sup>th</sup> April, 2018 seeking for *inter alia* permanent injunctive orders against the respondents arising out of a lease/tenancy agreement.
7. The plaint was filed together with a Notice of Motion of the same date seeking for a temporary injunction pending the hearing and determination of the suit, amongst other orders.
8. The aforementioned application was heard and dismissed by the trial court in its ruling delivered on 9<sup>th</sup> October, 2018.
9. Thereafter, the applicant sought for a review of the aforesaid ruling through her application dated 18<sup>th</sup> December, 2018 which was eventually dismissed by the trial court vide its ruling of 19<sup>th</sup> July, 2019.
10. The ruling delivered on 19<sup>th</sup> July, 2019 is now the subject matter of the intended appeal.
11. Before I consider the merits of the Motion, I deem it necessary to address an issue which was raised by the respondents. More

specifically, the 1<sup>st</sup> respondent asserted that the current application and the intended appeal have no relation whatsoever to the application which was dismissed, hence this court lacks jurisdiction to hear and determine the application. This position was restated in the respondents' submissions.

12. Upon my perusal of the plaint annexed to the Motion, I have established that the cause of action is founded on trespass and unlawful forcible eviction arising out of a tenancy relationship and the orders being sought in the plaint are of an injunctive and declaratory nature.

13. Both trespass and forcible/wrongful eviction are known to constitute torts which means that this court is clothed with jurisdiction to entertain both the application and the intended appeal.

14. It is clear that the application concerns itself with the granting of an interlocutory injunction. The germane principles on interlocutory injunctions were stated by the Court of Appeal of 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.*

15. As concerns the foremost principle, the applicant stated in her affidavit that she has a prima facie appeal with high chances of success. The same was reiterated in her submissions.

16. On his part, the 1<sup>st</sup> respondent contended that the application is a mere sham and is aimed at delaying the respondents' pursuit of justice.

17. In their submissions, the respondents argued that there never existed any agreement between themselves and the applicant, thereby supporting the trial court's decision to dismiss the application seeking a review of its earlier orders.

18. I have looked at the grounds raised in the draft memorandum of appeal and I note that the applicant is essentially arguing that the trial court failed to consider that her application for review brought forth sufficient grounds pertaining to the ownership of the premises in question and the lawfulness of the intended eviction.

19. To my mind, the appeal raises various issues primarily revolving around:

a) Whether the applicant paid rent as a sub-tenant of the subject premises to the respondents' father (Nahason Oduor) who is now deceased.

b) Whether the respondents adduced any evidence before the trial court to show their legal interest in the premises known as House No. 3000109 Mariakani Estate within Nairobi County ("*the subject premises*") and consequently, whether they have legal capacity to evict the applicant.

c) Whether upon the demise of the head tenant of the subject premises (Nahason Oduor), the same automatically reverted back to Nairobi County.

20. In my view therefore, the applicant has established a prima facie appeal with the possibility of success.

21. In respect to the second principle, the applicant contended that having resided in the subject premises with her family for over 18 years now, she stands to be rendered homeless if the respondents proceed to evict her before either the appeal and the substantive suit are heard and determined, thus rendering the appeal nugatory.

22. In contrast, the respondents took the position that the applicant has not demonstrated the manner in which she stands to suffer any irreparable loss if the application is dismissed.

23. To my mind, it is not in dispute that the applicant at all material times occupied the subject premises. It is also apparent that the applicant is a family woman with school going children.

24. I am therefore convinced that the reasons given by the applicant would constitute irreparable loss in line with the definition given in **Giella v Cassman Brown** (*supra*).

25. From the foregoing, I am also satisfied that the balance of convenience naturally tilts in favour of the applicant.

26. In the end, I find the Motion to be meritorious and the same is allowed in terms of prayer (iii) and make the following consequent orders:

*a) The appellant/applicant shall file and serve her memorandum of appeal within 21 days of this day.*

*b) The Deputy Registrar of this court to liaise with the Chief Magistrate's Court at Milimani Commercial Courts to supply certified*

*copies of the proceedings, judgment and decree to the appellant/applicant within 21 days from today.*

*c) The appellant shall subsequently prepare, file and serve her record of appeal within 7 days from the date of receipt of the aforementioned documents.*

*d) The Deputy Registrar to call for the lower court file to be availed to this court.*

*e) Costs of the Motion shall abide the outcome of the appeal.*

**Dated, signed and delivered at Nairobi this 20<sup>th</sup> day of December, 2019.**

.....

**J.K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant/Applicant

..... for the 1<sup>st</sup> Respondents

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