



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COURTS

CIVIL APPEAL NO 412 OF 2017

JOHN KINOTI T/A MWIGO ENTERPRISES...APPELLANT

VERSUS

PARKWAY INVESTMENT LIMITED.....1ST RESPONDENT

MOUNT KENYA UNIVERSITY.....2ND RESPONDENT

(Being an appeal arising from the Ruling and Order of

Honourable M. Obura (Mrs) PM delivered on

the 27th July 2017 in CMCC No 7370 of 2016)

RULING

INTRODUCTION

1. The Appellant's Notice of Motion application dated 3rd August 2017 and filed on 7th August 2017 was brought pursuant to the provisions of Section 3 and 3A of the Civil Procedure Act Cap 21 (Laws of Kenya), Order 42 Rule 6, Order 50 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all enabling provisions of the law. Prayer No 1 was spent. It sought the following remaining prayers:-

1. Spent.

2. THAT the Honourable Court do grant a stay of execution of the Order of the Honourable M. Obura (Mrs) PM in Chief Magistrates Civil Case No 7370 of 2016 delivered on 27th July 2017 to the extent that the applicant is not to be evicted from his premises located at Union Towers ground floor, pending the hearing and determination of this Notice of Motion and thereafter pending the hearing and determination of this appeal or until further orders of this court.

In the Alternative

2(a) THAT a temporary injunction be issued restraining the 1st and 2nd Respondents herein, by their advocates, agents, servants, auctioneers or otherwise from evicting, disconnecting, electricity or water supply, harassing, intimidating or in any other way interfering with the Applicant's peaceful occupation of the suit premises located at Union Towers ground floor, pending the and determination of this Notice of Motion or and thereafter pending the hearing and determination of this appeal or until further orders of this Court.

3. THAT costs of this application abide the results of the appeal.

THE APPELLANT'S CASE

2. The Appellant swore an Affidavit in support of his application on 3rd August 2017. His Supplementary Affidavit was sworn and filed on 13th September 2017. His Written Submissions were dated 4th October 2017 and filed on 5th October 2017.

3. His case was that the 2nd Respondent served him with an unlawful vacation notice which was different from an earlier notice it had given him when it wanted to place a Bill board on rented premises.

4. He was categorical that the Learned Trial Magistrate whose decision he was appealing, misapprehended and misinterpreted the law and evidence that was placed before her. He was apprehensive that if the stay of execution of the order was not granted, he would be evicted from his premises and thus render his appeal nugatory.

THE RESPONDENTS' CASE

5. On 4th September 2017, the Respondents filed a Replying Affidavit that was sworn by Anthony Mwangi on the same date. Their written submissions were dated 1st November 2017 and filed on 2nd November 2017.

6. Their case was that it had issued the Appellant a Notice to vacate the subject premises because it had breached fundamental breaches of the Tenancy Agreement. They argued that the Learned Trial Magistrate merely dismissed the Appellant's application and as her order was not a positive order, there was nothing to stay. They were emphatic that the Appellant's intended Appeal was not merited but was merely aimed at delaying the just determination of CMCC No 7370 of 2016.

7. They therefore urged this court to dismiss his present application with costs to them.

LEGAL ANALYSIS

8. The Appellant submitted that he had demonstrated an intention of filing an appeal as he filed his Memorandum of Appeal dated 3rd August 2017 on 4th August 2017 and his present application before the Notice to Vacate had expired.

9. He relied on the case of **CA No 48 of 2015 Selectica Limited vs Gold Rock Development** to buttress his argument that he would suffer substantial loss if a stay of execution of the order by the Learned Trial Magistrate and an injunction pending appeal were not granted. He was also emphatic that his right of appeal was a constitutional one as Aburili J held in the case of **Selectica Limited vs Gold Rock Development (Supra)**.

10. On their part, the Respondents argued that negative orders were not capable of being stayed. They contended that the Appellant had not demonstrated that he would suffer any substantial loss. They relied on the case of **Jamila Attarwalla & Another vs Hussein Abdulaziz & Another [2015] eKLR**, in this regard. They also relied on the cases of **Bilha Midewa Buluku vs Everlyne Kanyere [2016] eKLR** and **Giella vs Cassman Brown Limited (1973) EA 358** in which the principles of injunction had been set out.

11. They pointed out that the Appellant had endangered the entire building through illegal connection of electricity and causing them to incur a loss of Kshs. 1,282,035.41. It was their contention that the Notice was not an actual eviction but rather that the Tenancy Agreement provided for breaches.

12. They submitted that the Appellant had approached this court with unclean hands and thus urged it to dismiss the said application with costs to them.

13. It was evident from the Appellant's Notice of Motion application that he had sought stay of execution of the order that was granted by the Learned Trial Magistrate and/or in the alternative a temporary injunction pending the hearing and determination of the Appeal herein. On 23rd August 2017, Seron J granted him a temporary injunction against the Respondents.

14. The issue before this court was therefore whether or not the Appellant had demonstrated a *prima facie* case for him to be granted an interlocutory injunction pending the hearing and determination of the Appeal herein.

15. This court noted that the Appellant did not attach a copy of the Order he was appealing against making it difficult for it to know the exact order that was granted by the Learned Trial Magistrate. He did not also attach a copy of the said order when he filed his Supplementary Affidavit on 13th September 2017 thus rendering his application technically defective. Indeed, this court was completely in the dark as to what order he had sought and obtained in the lower court.

16. Be that as it may, this court noted that in his Certificate of Urgency that was dated 3rd August 2017, he alluded to the said application having been one of injunction, a fact that was confirmed by the Respondent herein. To avoid dismissing the present application on a technicality and by virtue of the provisions of Article 159 (2)(d) of the Constitution of Kenya, 2010, this court deemed it necessary to consider the merits or otherwise of the said application for completeness of record.

17. Notably, the three (3) requisite conditions for granting a stay of execution can be found in Order 42 Rule 6 of Civil Procedure Rules, 2010. An applicant must demonstrate all the following ingredients:-

a. That he will suffer substantive loss if the order of stay was not granted;

b. That he had filed his application for a stay of execution timeously; and

c. That he was willing to provide security.

18. As the Respondent rightly pointed out, the Appellant did not demonstrate that the aforesaid three (3) conditions obtained in his case. On that ground alone, this court agreed with them that this application must fail.

19. Going further, as the Respondents also submitted, the orders that were issued by the Learned Trial Magistrate were negative in nature and were not capable of being stayed. In the case of **Milcah Jeruto vs Fina Bank Ltd [2013] eKLR**, this court had occasion to deal with a similar issue relating to granting orders for a stay and held that as the respondent therein had not expected to act on the order that the applicant therein had sought to stay, no stay could be granted. It was on that basis that this court agreed with the Respondents that stay orders could not be granted herein as the Learned Trial Magistrate issued a negative order when she dismissed the Appellant's application for an injunction.

20. Turning to the alternative prayer, this court appreciated that an injunction can be granted pending an appeal. In the case of **Madhupaper International Ltd vs Kerr [1985] eKLR**, the Court of Appeal held that where a judge dismisses an application for interlocutory injunction, he has jurisdiction to grant an applicant an injunction pending appeal so as to prevent the appeal being rendered nugatory in the event the appeal is successful. A similar principal was held in the case of **Erinford Properties Ltd vs (Cheshire County Council [1974] 2 All ER 448**.

21. Having said so, an applicant must demonstrate the criteria set out in the case of **Giella vs Cassman Brown Ltd (Supra)**. A careful perusal of the Appellant's Affidavit evidence showed that he did not demonstrate **THAT:-**

- a. He had established a *prima facie* case with high chances of success;**
- b. Damages would not be adequate compensation if the interlocutory injunction was not granted;**
- c. Balance of convenience should tilt in his favour.**

22. Indeed, this court found that the balance of convenience actually tilted in favour of the Respondents herein. Appreciably, he did not even submit on the issue of injunction and merely limited himself to the question as to whether or not he should be granted a stay of execution of the order of the Learned Trial Magistrate dismissing his application for a temporary injunction.

23. Accordingly, having considered the affidavit evidence, the Written Submissions and the case law that the parties relied upon, this court came to the firm conclusion that the Appellant did not demonstrate that he was entitled to stay of execution orders and/or an interlocutory injunction pending the hearing and determination of the Appeal.

DISPOSITION

24. For the foregoing reasons, this court found that the Appellant's Notice of Motion application dated 3rd August 2017 and filed on 7th August 2017 was not merited and the same is hereby dismissed with costs to the Respondents.

25. It is so ordered.

DATED and DELIVERED at NAIROBI this 31st day of May 2018

J. KAMAU

JUDGE