



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 425 OF 2008

ESTHER MUTHONI PASSARIS..... APPELLANT

VERSUS

KULTAR SINGH HANSPAL.....RESPONDENT

(Being an appeal against the whole of the Ruling and Orders of the Hon. Mr. Kiarie, Magistrate made at the Chief Magistrate's court of Kenya, Nairobi (Milimani commercial Courts) on 21st July 2008)

JUDGEMENT

1. The Appellant **Esther Muthoni Passaris** has filed an appeal against the decision of the Magistrate in a ruling dated 21st July 2008. The appellant had filed an application date 29th April 2008 seeking for an injunction against the respondent herein. The trial magistrate upon hearing the application delivered ruling dismissing the application for lack of merit.
2. The appellant was aggrieved by the ruling and preferred this appeal on the following grounds:
 1. *The Learned Magistrate erred in law in failing to apply the principles established in the case of **Giella Vs Cassman Brown** in determining the application.*
 2. *The Learned magistrate erred in act in failing to take into consideration the fact that the rent in issue had already been paid.*
 3. *The Learned magistrate erred in fact in failing to appreciate that the defendant could not reprobate the tenancy agreement and seek rent under the same tenancy agreement at the same time.*
 4. *The Learned magistrate erred in law and in fact in refusing to grant the injunction orders sought.*

This being the first appeal, this court is bound to re-evaluate the evidence tendered before the trial court and arrive at an independent conclusion but also taking into account the fact that it did not have the advantage of hearing and observing the demeanour of the witnesses. In **Peters v. Sunday Post Limited (1958) EA at Pg. 424**, it was held interalia as follows:

"It is a strong thing that for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: It is not enough that the appellate court might itself have come to

a different conclusion."

3. I have considered the arguments of the parties as laid out in their submissions and I have re-evaluated the application on evidence as adduced in the trial court. I have also taken note that the magistrate did not give reasons for dismissal of the application and only dismissed it for lack of merit.
4. The gist of this appeal is the dismissal of an interlocutory application which sought to injunct the respondent or his agents from executing the proclamation for attachments by Keysian Auctioneers. The application arose from a suit filed by the appellant who sued the respondent in CMCC 2529 of 2008 in her plaint the appellant claimed that she had entered into a tenancy agreement between the respondent and herself in the year 2006 for a residential premises that she occupied as a lessee. She averred that she entered into another lease agreement on 1st October 2007 for a period of another two years. She claims that she performed her obligations under the lease and remitted her rent until July 2007 to the respondents wife, **Alka Sharma** who was managing the properties of the respondents upon claiming that he was mentally ill. She asserted that the respondent demanded for rent for the months of June 2007. She explained that she had paid rent in full to **Alka Sharma** until July 2007 and the rent of the months of August and September 2007 was offset against the refundable deposit and other refundable advances that she had paid to **Alka Sharma**. She further stated that on 18th April 2008, the respondent through his auctioneers purported to proclaim the plaintiff's property in an alleged distress for rent of June – September 2007 in breach of the lease.
5. It is on this ground that the appellant sought injunctions orders against the respondent, his agents or servants including the Keysian Auctioneers from executing the contents of proclamation for attachment made on 18th April 2008 or issuing any further proclamation for attachment against the appellant.
6. Having set out the ground on this appeal, I wish to consider the merits of the appeal. A closer look at the grounds of appeal, it is clear that the 2nd and 3rd grounds appeal go into the matters touching on the main suit so I will not handle the same. However, grounds 1 and 4 are related as they touch on the application. The appellant claims that the magistrate erred in law in failing to apply the principles established under the classic case of **Giella -vs- Cassman Brown Ltd. [1973] EA 358**. where the court laid out the principles of granting an injunction; it was held that, firstly, an applicant has to show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant will otherwise suffer irreparable loss not capable of being compensated in damages. Thirdly, if the court is in doubt, it will decide the matter or application on a balance of convenience.
7. According to the evidence adduced by the appellant, it is evident that there was a lease agreement between the appellant and the respondent which was meant to commence on 1st September 2006 for payment of rent of kshs 150,000/= per month. The parties then entered into another lease agreement that commenced on 1st October 2007 for a period of 2 years which lease proposed rent payable would be kshs.150,000/= per month subject to an escalation of 10% in the following year.
8. The appellant further adduced a proclamation from Keysian Auctioneers for distress for rent which proclamation enlisted her property and threatens to execute. She further produced a demand letter that requested the respondent to retract his instructions to the auctioneers but the same was not complied with. She also attached various bank statements though she did not offer an explanation on the same.
9. The respondent in response to the application has alluded to his estranged wife colluding with the appellant by entering into a lease agreement with her. He claimed that the two had colluded to sell to the appellant's property at kssh.35,000,000/= instead of ksh.50,000,000/= He averred that the appellant paid her rent to his estranged wife instead of paying it to him yet she was aware that he was the owner of premises.
10. On the face value, it is clear that the appellant being the tenant were used to pay rent in the first lease to the respondent's wife since she claims that the 1st lease was between the wife **Alka Sarma** and herself

following her husband's mental illness. She further claims that the second lease was between the respondent and herself and therefore the rent was payable to him. She alleges that the rent of July 2007 – September 2007 was remitted to the respondent's wife and therefore the respondent has no claim on the same. Clearly there are contentious matters that should be decided during trial and not at the interlocutory stage. However, for purposes of justice and to avoid rendering the court's work an academic exercise, I believe it's only fair to grant injunctory orders so I am convinced that the appellant has established a prima facie case.

11. The appellant claims that she still resides in the premises. The property to be proclaimed is mostly her household in the circumstances is proclamation was to be effected, I believe she would suffer irreparable loss. The balance of convenience tilts in favour of the appellant seeing that the respondent admits to his wife receiving rent and managing his properties. He is not denying that the rent might have been received only that the same was not paid to him.

12. In the circumstances this appeal is allowed. I hereby set aside the orders of the trial court made on 21st July 2008 and substitute with an order allowing the application dated 29th April 2008.

13. Each party to bear their own costs of appeal.

Dated, Signed and Delivered in open court this 12th day of February, 2016.

J. K. SERGON

JUDGE

In the presence of:

.....for the Applicant.

..... for the Respondent.