



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 29 OF 2016

FRANCIS GITAU T/A FEMFA AUCTIONEER APPELLANT

VERSUS

TRANS MATTRESSES SUPERMARKET LTDRESPONDENTS

RULING

1. The application for determination before the court is the Notice of Motion dated 1st March, 2016. The application is expressed to be brought under *Section 3, 3A of the Civil Procedure Act; Order 51 Rule 3, 4 and 15 of the Civil Procedure Rules 2010* and all enabling provisions of the law.
2. In the motion, the applicant *Francis Gitau T/A Femfa Auctioneer* prays that the exparte orders granted on 16th February 2016 by the lower court in Eldoret CMCC No. 749 of 2011 be stayed and or suspended pending the hearing and determination of his appeal.
3. The application is premised on grounds that the lower court made adverse orders against the applicant in his absence on 9th February, 2015 contrary to the rules of Natural Justice; that the court denied him audience on 16th February, 2016 and issued further adverse orders against him; that the exparte orders affected his livelihood and if they are not stayed or suspended, the applicant will suffer substantial harm and loss.
4. In support of the application, the applicant swore an affidavit on 1st March, 2016 in which he reiterated some of the grounds anchoring the motion. He in addition deposed that he was not a party to Eldoret CMCC No. 749 of 2011 and that he only became aware of the suit on 3rd November, 2015 when he was served with an application dated 30th October, 2015. That application together with other documents is annexed to the supporting affidavit in the bundle of documents marked as exhibit "FGI".
5. The application dated 30th October, 2015 sought *inter alia*, orders seeking to compel the applicant to deposit in court a sum of Kshs. 168,000 in compliance with orders issued by the same court on 9th February, 2015 and in the event of default, that the applicant be suspended from serving as an Auctioneer within the jurisdiction of the court.
6. The applicant also contended that he filed an application dated 6th November, 2015 seeking to set aside the orders of 9th February, 2015 but the trial court denied him audience insisting that he was in contempt of court and that in order to be heard, he had to first deposit the Kshs. 168,000. It is the applicant's case that the amount he was being compelled to deposit in the trial court was colossal and if he was forced to deposit it before being heard, he will not only suffer substantial loss but he will be punished before being given an opportunity to defend himself.
7. The application is opposed. There are grounds of opposition filed by the respondent *Trans Mattresses Supermarket Ltd* filed on 8th April 2016. In the main, the respondent claims that the application is misconceived and incompetent; that the appeal filed does not relate to the orders

sought to be stayed and that the instant application amounts to an appeal through the back door; that the applicant is still in contempt of the trial court orders of 9th February, 2016 and does not therefore deserve audience before the High Court. The respondent further asserted that this court cannot stay or suspend an order that is not before it.

8. The application was argued before me on 12th April, 2016. Learned counsel *Mr. Kariuki* represented the applicant while learned counsel *Ms Matoke* appeared for the respondent.

In their submissions, learned counsel for both parties reiterated and expounded on the cases put forward by their respective clients in their pleadings.

9. I have carefully considered the application, the supporting affidavit and its annexures; the grounds of opposition, the rival submissions made by the parties, the authorities cited by the applicant and the grounds of appeal.
10. I wish to start by considering the preliminary point of law raised by the respondent to the effect that the application is incompetent allegedly because the instant appeal does not relate to the orders sought to be stayed. I have looked at the memorandum of appeal. It clearly shows that the applicant is challenging the legality of the decision of the trial court made on 16th February 2016 which is the subject of the instant application.

The respondents claim that the appeal does not relate to the orders sought in the application is thus entirely baseless. I am satisfied that the application is competent and is properly before the court.

11. Turning now to the merits of the application, I find that it is not disputed that the applicant was not a party to the proceedings in Eldoret CMCC No. 749/2011 in which the impugned orders were made. The record of the lower court which has been availed to this court shows that the respondent in this appeal was the 3rd defendant in the suit. It also shows that on 9th February, 2015 on application by the respondent the trial court (*Hon. Nicodemus Moseki RM*) in the absence of the applicant made orders requiring the applicant to deposit in court within 10 days Ksh. 168,000 allegedly paid to him by the respondent in his capacity as an auctioneer as part payment of the decretal amount in respect of which he had proclaimed movable property belonging to the respondent. It was after those orders were issued that the trial court *suo moto* joined the applicant to the proceedings by fixing the case for mention on 24th February, 2015 and directed the respondent to serve the applicant with a mention notice.
12. The applicant has asserted in his deposition and this has not been disputed by the respondent, that he was not served with the trial court orders of 9th February, 2015 and that he only became aware of the proceedings about eight months later when he was served with the application dated 30th October, 2015. He then challenged the orders by filing the Notice of Motion dated 6th November, 2015 in which he prayed that the orders be discharged or set aside since he had been condemned unheard.
13. The record shows that both applications (the respondent's application dated 30th October, 2015 and the applicant's application dated 6th November, 2015) were scheduled to be heard together on 16th February, 2016. On that date, though learned Counsel *Mr. Kariuki* was present for the applicant, the court refused to give him an opportunity to either prosecute the applicant's motion or state the applicant's position with regard to the orders sought against him in the application dated 30th October, 2015. The court held that having disobeyed the court orders (the same ones the applicant was seeking to have discharged or set aside), he had no audience to address the court. The court then proceeded to dismiss the applicant's motion and allowed the respondent's application.
14. It is against this background that the applicant urges this court to stay the said orders pending the determination of his appeal principally on grounds that they were issued in breach of the rules of natural justice and that his appeal has high chances of success.
15. The rules of natural justice comprises two cardinal principles which are that no man shall be condemned unheard (*audi alteram partem*) and that no man shall be a judge in his own cause (*nemo iudex in causa sua*). The right to a fair hearing requires that a person who is likely to be

adversely affected by a decision should be heard before that decision is taken.
16. As I stated in *David Mulei Mbuvi & 13 others V The Registrar General at 2 others (2012) eKLR*

“it is trite law that these twin rules of natural justice must be observed by not only courts and tribunals but also by persons or public bodies who have a duty to act fairly. The rules of natural justice are inherent in all proceedings or decision making processes be they judicial, quasi-judicial or administrative as long as they affect the rights and interest of citizens...”

17. In *J M K V M W M & Another Civil Appeal No. 15 of 2015 (2015) eKLR*, the Court of Appeal when speaking to the importance of this right in the administration of justice stated as follows;

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard”.

18. It is also pertinent to note that the right to a hearing has now been elevated from a common law principle to a constitutional right. It has been enacted under *Article 50(1)* of the Constitution and it is one of the fundamental rights which under *Article 25* cannot be limited.

19. Having discussed what constitutes the rules of natural justice and the significance of the right to a hearing, I do not find it prudent to delve deeply into the issue of whether or not the applicant’s right to a fair hearing was violated by the learned trial magistrate considering that this is one of the key issues that will need to be determined by the appellate court in the pending appeal. However, looking at the proceedings before the trial court and the rulings dated 9th February 2015 and 16th February 2016 and without making any finding, I am of the view that prima facie, the applicant has demonstrated that in making the impugned orders, the trial magistrate may have contravened the rules of natural justice.

20. Having considered the grounds of appeal and noted that the main issue for consideration in the appeal is whether the trial court erred in making the disputed orders, I find that if the said orders are not stayed, the applicant will have no choice but to comply with them and this will in effect render the appeal nugatory or useless. It is therefore necessary to stay the said orders in order to preserve the substratum of the appeal.

21. The upshot is that the Notice of Motion dated 1st March, 2016 is merited and it is hereby allowed as prayed.

22. The costs of the application shall abide the outcome of the appeal.

It is so ordered.

C. W. GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 23rd day of June, 2016

In the presence of:

Mr. Mwinamo holding brief for Mr. Sifuna for the Respondent

Ms Naomi Chonde Court clerk

No appearance for the Applicant