



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 126 OF 2013

JOHN KAILEMIA GICHARA T/A GREEN CAFE.....APPELLANT

VERSUS

AHMED SAID SALIM1ST RESPONDENT

SAID SALIM SAID) As Administrator of the estate of

SAID SALIM GHANIM).....2ND RESPONDENT

RULING ON THE NOTICE OF MOTION DATED 11TH AUGUST 2014

1. The respondents in this Appeal, Ahmed Said Salim and Said Salim Said, filed the Notice of Motion, dated 11th August 2014 (herein after referred as the application). By that application the respondents sought the setting aside of the order of stay pending appeal granted by the magistrate's court on 24th July 2014. Having considered the affidavit evidence and the parties' submissions I find that the application has no merit and the same is hereby dismissed with costs to the appellant.

2. Mombasa Chief Magistrate's Court Civil case No. 356 of 2013 was filed by the respondent herein whereby they sought orders for the appellant to give vacant possession of the premises known as plot No. 974/VI.MN (herein after called the property). The respondents by a lease dated 28th January 2008, leased the property to the appellant for a period of five years and three months. The appellant, John Kailemia Gichara, defended that suit by filing a defence and counter claim. It is not denied that the respondents, on 23rd September 2013, successfully obtained an order to strike that defence and counter claim and an order for the appellant to give vacant possession of the property to the respondents. It is those orders that are the subject of this appeal. The appellant obtained an order of stay pending appeal of those orders on 24th July 2014, which stay the respondents seek to set aside by the application under consideration.

3. The application is brought under the provisions of Order 42 Rule 6(1) of the Civil Procedure rules which provides;-

“ No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

4. It will be noted that the Rule does empower the court to set aside an order of stay made by the court

appealed from. It is important to state that the magistrates court in granting the stay which stay is challenged by the present application ordered the appellant to deposit the accrued rent into an account in the joint names of the advocates in this matter.

5. Before the hearing of the application before me parties entered into consent to the effect that the money held in that account be released to the advocate representing the respondents. The Magistrate's stay order therefore only now relates to the order for vacant possession of the property. The order for vacant possession to be surrendered by appellant is the *cux* of this appeal. For the respondents to argue that to allow the appellant to continue occupying the property would be an abuse of the court process or that it would be tantamount to the court creating a contract between the parties, since the lease has expired, would be to allow the appeal to be argued by way of the application even before the appeal is admitted for hearing. This was the conclusion reached by the High court sitting in Nakuru in the case, ***Disciples of Christ Church Vs Mungai & 48 others (2004) eKLR***, where the court stated;-

“As stated earlier at the beginning of this ruling, it is evidence from the arguments put forward by the applicants that the applicants were in effect arguing against the appeal before the appeal was formally admitted to hearing. In their anxiety to have the order of stay issued against them vacated, the applicants have not drawn the boundary between the application to set aside the stay order and the appeal itself. The applicants are in essence asking this court to make a ruling concerning the matters in issue in the appeal before the said appeal has been admitted to hearing and listed for hearing.

This court would prejudice the hearing of the appeal were it to make the decision that the applicants have sought in this application. As stated earlier, this court has not had the benefit of reading the record of appeal consisting of the pleadings and the proceeding before the trial Magistrate's court. The application to set aside the stay order issued, in so far as it addressed the matters in issue in the main appeal, cannot therefore be allowed.”

Those are the sentiments I hold in this matter.

6. The respondents do not show that the learned magistrate breached in any way the principles of granting a stay as set out in Order 42 Rule 6 (1) and (2). Instead the respondents seek to argue the very grounds that this court will be called upon to consider when hearing the main appeal. It is for that reason that I find there is no merit in the application and the same is dismissed with costs to the appellant.

DATED AND DELIVERED AT MOMBASA THIS 28TH DAY OF MAY 2015.

MARY KASANGO

JUDGE

28th May 2015

Coram

Before Hon. Justice Mary Kasango

C/Assistance – Kavuku

Present for:

Appellant

For 1st respondent

For 2nd respondent

Court Ruling delivered in their presence/absence in open court.

MARY KASANGO

JUDGE