



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MILIMANT

ELCA NO. E055 OF 2021

JACKSON KAMAU NDEGWA.....1ST APPLICANT

ANNE NJERI WANYEJI.....2ND APPLICANT

VERSUS

EVERLYNE MUTHAMIA.....1ST RESPONDENT

MARKFORD MUOKI.....2ND RESPONDENT

MAWORKS PROPERTY MANAGEMENT CO.LTD.....3RD RESPONDENT

RULING

(Being an Appeal from the Judgment and Decree of the Business Premises and Rent Tribunal by Hon. Andrew Muma (Vice-Chairman) on the 18/06/2021 in Nairobi BPRT No. 232 of 2021)

1. By a Notice of Motion Application dated the 12/10/2021 brought pursuant to Order 40 Rule 2 of the Civil Procedure Rules, Sections 1A, 1B, 3, 3A and section 63 of the Civil Procedure Act and Judicature Act Chapter 8 the 1st Appellant seeks the following orders:

- i) Spent
- ii) That the High Court do order the Respondents to open business premises forthwith
- iii) That this High Court issue preservative orders until this appeal is heard and determined
- iv) That this honorable court issue orders for damages
- v) That the court condemns the respondent/landlady with the cost of this suit

2. The Application is premised on the attached affidavit of the appellant and based on the following summarized grounds; that the appellants who are acting in person are aggrieved by the closure of their business premises which they claim was done through the backdoor without a notice issuing to the appellants. Further that the closure and refusal to reopen the business premise which is illegally closed is a sure way of killing their business without any legal justification. That the 1st defendant never gave notice and neither was the appellant consulted.

3. The appellant avers that he took possession of the suit premises in November 2020 and paid rent up to February 2021. Yet as a result of the illegal eviction, the 1st defendant has already found a new tenant, who moved in after paying the requisite deposit and three months' rent in advance.

4. He contends that the landlady has subjected the appellant/plaintiff's business to agony and thrown the workers into disarray and plunged the appellant to depths of despair, untold suffering, anguish, irreparable damage including deprivation of livelihood.

5. The application was opposed by the Respondent who filed a replying affidavit where she deposes that she is the property manager and lessor of the business premises which is the suit premises. She avers that this application dated 12/10/2021 for conservatory orders is overtaken by events because she had already admitted a new tenant and signed a new lease agreement for the next three years starting 01/10/2021.

6. The 1st defendant avers that she took on a new tenant in the absence of a stay order although the process took longer since the appellant

had failed to collect his goods from the suit premises.

7. The 1st defendant avers that she was forced to hire a facility to store the goods of the appellant who did not collect them. Further that granting the prayers sought by the appellant would be an exercise in futility since there is a new lease agreement now.

8. The application was canvassed by way of written submissions, but it is only the Respondent who filed his.

Analysis and Determination

9. Upon consideration of the Notice of Motion dated the 12/10/2021 including the respective affidavits as well as the annexures thereon and submissions, the only issue for determination is whether the Appellants are entitled to the orders as sought.

10. It is the 1st defendant's submission that the present application is fatally defective as there exists no prayer for stay of execution of the lower court orders, pending the hearing and determination of the Appeal herein. She reiterates that the application is frivolous and based on imaginary grounds since the issues raised were litigated at the Tribunal during the trial. Further that the Ruling was rendered on 18/06/2021 and the Notice of Motion was lodged on 12/10/21 which is 44 days later and this was an inordinate delay. The 1st defendant therefore contended that the Notice of Motion application lacked merit, was an abuse of the court process and urged the court to dismiss the application with costs.

11. From a perusal of the instant application including the grounds and annexures thereon, I note the fulcrum of the dispute herein revolved around a landlord/tenant relationship culminating in the appellant lodging a claim at the BPRT. What is interesting is that injunctive orders were sought after the appellant had already been evicted. Insofar as the 1st defendant is concerned, the appellant's claims through the present application is fatally defective as it raises no cause of action and further that the preservative orders sought have been overtaken by events since there is a new tenant with a lease agreement for three years. I am aware that the court never acts in vain and therefore where litigant has suffered damages, the court can compensate. I opine that since prayer no. 3 sought for preservative orders nothing stops this court from acting to ensure that it shall meet the ends of justice, this court is bound to focus on substantive justice.

12. The Court of Appeal in the case of *Mugah vs. Kunga [1988] KLR 748*, upheld the practice of issuing status quo orders in land matters and stated thus: ***"Status quo orders should always be issued for purposes of preserving the subject matter. This court's practice direction vide Gazette Notice No. 5178/2014 have followed suit. Practice direction No. 28(k) is relatively clear. It gives the court the leeway and discretion to make an order for status quo to be maintained until determination of the case."***

13. In the case of *Fatuma Abdi Jillo v Kuro Lengesen & another [2021] eKLR*, the Judge observed as followings: ***'From the above cases, the following matters relating to status quo orders are emergent: First, that status quo orders can be made by the court on its own motion in exercise of its general jurisdiction. As such, the Appellant's assertion that the orders have to be specifically prayed is incorrect. In any case, the last prayer in the 1st Respondent's Notice of Motion application was for such orders as the court deemed just and fair. In the interest of balancing the scales of justice prior to the site visit, the trial court deemed it fair to grant status quo orders, which it is perfectly entitled of doing in exercise of its general discretionary powers..... Thirdly, that status quo orders are different from injunctions, meaning that the considerations to be established for grant of injunctions are not necessary under status quo orders. While appreciating the case quoted by the Appellant Walter Anyango T/A Anyango Ogotu & Co Advocates Vs Barclays Pension Services Limited & Another [2019] eKLR to the effect that status quo orders are tantamount to injunctions, it is clear that the circumstances in that case were of a special character so that the effect of an injunction and a status quo order, would have the same effect. Indeed, in the case of Msa Misc Appln. (J.R) No. 26 of 2010. The Chairman Business Premises Tribunal at Mombasa Exparte Baobab Beach Resort (Mbsa) Ltd (UR), the court agreed that in certain circumstances, a prohibitory injunction may end up having the same effect as an order for status quo. This does not however mean that an injunction and a status quo order are one and the same thing, merely, that in certain circumstances, particularly where the order sought is one of a prohibitory injunction, it may happen that the effects of a that injunction and a status quo order may be similar. Since the court was dissatisfied that the Applicant (Plaintiff) had failed to satisfy the conditions precedent to a grant of the injunctive orders sought, it was proper to deny those orders but instead to make an order for the preservation of status quo pending determination of the main suit.'***

14. See also the cases of *Thugi River Estate Limited & another Vs National Bank of Kenya Limited & 3 others [2015] e K.L.R and Boabab Beach Resort as quoted by F. Tuiyot Saifudeen Abdullahi & 4 Others in Mombasa High Court Misc. Civil Cause No. 11 of 2012.*

15. In this instance, I note the appellant admits the 1st defendant already evicted him out of the suit premises. Further, the defendants admitted that they have leased the suit premises to a third party who is not in these proceedings. The 1st defendant has made a strong case for dismissal of this application but it is my view that there is already a Memorandum of Appeal on record and so as not to render the same an academic exercise, I am of the view that in order to balance the scales of justice, it is pertinent to preserve the substratum of the suit by making an order of status quo in this instance so as to enable the parties ventilate on the Appeal. It has emerged that the appellant is already out of the suit premises and there is a third party therein. Further, I note the 1st defendant avers that the appellant owed Kshs. 52,500 yet the appellant through the affidavit sworn by Jackson Ndegwa, averred that they had paid rent from November 2020 to February 2021. This issue actually touches on the fulcrum of the dispute as they relate to payment of rent. As a court, I cannot disregard this since it touches on the core of this suit.

16. In the circumstance, while associating myself with the quoted decisions, I will not allow the application as framed but direct that the obtaining status quo be maintained, pending the hearing and determination of the Appeal.

17. Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI 15TH DAY OF FEBRUARY, 2022

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MOGENI J

JUDGE

Jackson Kamau Ndegwa - the 1st Plaintiff/Appellant

Anne Njeri Wanyeki - the 2nd Plaintiff/Appellant

Mr. Alosa for the Defendants

Mr Vincent Owuor.....Court Assistant