



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 85 OF 2013

HEALTH DEVICES (K) LIMITED APPELLANT

V E R S U S

1. BAWAN LIMITED 1ST RESPONDENT

2. E. M. MAABI T/A MURPHY MERCHANTS 2ND RESPONDENT

RULING

1. This appeal was filed against an order made in **SPMCC Mbsa No. 1057 of 2013** on 21st, 24th and 28th June, 2013.
2. The dispute before the lower Court relates to the distress for rent undertaken by the Respondent in this appeal against the Appellant.
3. Appellant filed a Notice of Motion dated 2nd August 2013 where it seeks stay of further proceedings in **SPMCC Mbsa 1057 of 2013**. Appellants also filed a Preliminary Objection to the Respondents' application dated 15th August 2013.
4. On 7th October 2013 parties herein recorded a consent as follows-

“By consent Appellant’s goods and office equipment in possession of the 2nd Respondent be forthwith released to the Appellant unconditionally and the costs of the Notice of Motion dated 4th October 2013 to be in the cause.”

That consent was adopted by the Court as an order of the Court.

5. When the matter came up before Court on 5th March 2014 it was brought to the attention of the Court that the Respondents had failed to release Appellant’s goods as per the consent recorded before Court. The Court adjourned the matter to 10th March 2014 to give Respondents opportunity to obey the Court order and the Court made an order that if the Respondents did not obey the consent order they would be denied audience before Court.
6. On 10th March 2014 Respondents had not complied with the consent order and Appellant was heard on its application and Preliminary Objection ex parte.

7. Appellant's Notice of Motion dated 2nd August 2013 seeks to stay the proceedings of **Mbsa SPMCC 1057 of 2013**. Appellant allege that during the hearing of the lower Court matter the learned Magistrate displayed bias against Appellant. Appellant stated that the bias can be seen from the fact that the learned Magistrate issued a Ruling on an application not argued before her. Appellant relied on the case **SERAH NJERI MWOBİ (Administrator of the Estate of the Late John Muigai Mwobi) AND JOHN KIMANI NJOROGE (2013)eKLR** where Court of Appeal stated-

“... justice ought to be administered impartially.” The Court, further, held that **“it is a tenet of a fair trial that all parties to a dispute must have the right to due process of law in order to resolve the dispute, and due process of law requires that the parties be given a hearing before an unbiased and impartial decision maker as part of the resolution process ... public confidence in the administration of justice is indispensable. It is not enough that judges be impartial, the public must perceive them to be so.”**

As result of the lower Court Ruling on an application which had not been argued Appellant said that they were condemned unheard contrary to the principle of **“audi alterem partem, auditor et altera pars”** which means no man should be condemned unheard or without having had an opportunity of being heard.

8. Appellant's application in my view is merited. To grant the orders sought would ensure that this Court will have an opportunity to hear the appeal and determine the issues raised therein before the lower Court's matter is heard and determined.
9. Order 42 Rule 6(1) of the Civil Procedure Rules is the appropriate order that applies to the present application. That Rule is in the following terms-

“6.(1) 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.”

Under that Rule this Court has power to stay the lower Court's proceedings.

10. The Preliminary Objection dated 15th September 2013 is in

following terms-

“TAKE NOTICE that the Appellant herein will, at the commencement of the hearing of the Respondents' application by way of Notice of Motion dated 15th August 2013 raise a Preliminary Objection of the grounds that this Honourable Court has no jurisdiction to hear or determine the application for security of the rent brought under the Provisions of Order 26 Rule 1 and 6 of the Civil Procedure Rules in this Appeal.”

11. The Objection is directed at Respondents application dated 15th

August 2013 brought under Order 26 Rule 1. By that application Respondent seeks two prayers. One is for Appellant **“to furnish security to provide rent at the rate of Kshs. 234,157/- per month**

to the 1st Respondent.” The second is for Appellant *“to deposit Kshs. 702,471/- from 1st June 2013 and thereafter every quarter.”*

12. Appellants Objection is based on two grounds. Firstly that the Respondent has filed an identical application in the lower Court and secondly that this Court has no jurisdiction to entertain the application.

13. In respect of the first limb of the Objection the filing of the application before this Court when a similar application is also before the lower Court goes against the provisions of Section 6 of the Civil Procedure Act. That is the Section which forbids a Court to proceed with a suit or proceedings which are before another Court. Appellant in its submissions termed the filing of that application before this Court as an abuse of the process of this Court. I dare say that Appellant is correct for indeed what a travesty there would be if the lower Court on the same application reached a conclusion that was diverse to the one this Court would reach. It follows that, that limb of Objection is well taken and is upheld.

14. On the second limb Appellant submitted that this Court has no

jurisdiction to entertain that application because it lacked jurisdiction. Appellant to bolster its argument relied on the now well quoted case of OWNERS OF THE MOTOR VESSEL “LILIAN 3” –Vs- CALTEX OIL (KENYA) LTD [1989]KLR, where the Court stated-

“... Jurisdiction is everything. Without it a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A Court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

15. What is before this Court for determination is an appeal against

an order made by the Senior Resident Magistrate in SPMCC Mbsa No. 1057 of 2013. At the end of this appeal this Court will determine whether there is merit in vacating the lower Courts order. It follows as submitted by Appellant that this Court does not have original jurisdiction to hear prayers for security of rent or costs. Such an application rightly should be taken to the lower Court which is seized with the whole dispute between the parties relating to the rent due or payable by Appellant. Appellant’s second limb of Objection does therefore also succeed.

16. In view of the Court’s finding above the Court makes the

following orders-

- a. **That there shall be a stay of further proceedings in SPMCC No. 1057 of 2013 until the hearing and determination of this appeal.**
- b. **Costs of Notice of Motion dated 2nd August 2013 are awarded to Appellant as against both Respondents.**
- c. **The Appellant is also awarded costs of the Preliminary Objection dated 15th August 2013 as against both Respondents.**

DATED and DELIVERED at MOMBASA this 3RD day of APRIL, 2014.

MARY KASANGO

JUDGE