



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

CIVIL APPEAL NO. 73 OF 2021

ANANIAS NYAMU KIRAGU

PETER KINYUA MUCHENDU T/A KINYUA AUCTIONEERS.....APPELLANTS/APPLICANTS

- VERSUS -

YEHUDA AHARONI

RONEN MUELEM T/A AR CASOURINA.....RESPONDENTS

RULING

I. Introduction

1. The Notice of Motion application before this Honorable Court for hearing and determination is dated 2nd November 2021. It is brought by the Appellants/Applicants under the dint of Sections 1A, 1B, & 63(e) of the Civil Procedure Act, Cap. 21, Order 40 Rules 1 & 11 of the Civil Procedure Rules, 2010 and Articles 48, 57 & 260 of the Constitution of Kenya.

II. The Appellants/Applicants case.

2. The Appellant/Applicants herein sought for the following orders to wit:- that pending the hearing and determination of the interlocutory appeal filed, before this court, the Respondents be ordered to pay the Appellants/Applicants or remitting the said proceeds into their Advocate's account for the rent which is an outstanding arrears of a sum of Kenya Shillings Eight Million (Kshs. 8,000,000/=)in respect to all that property known as Plot No. 3863/III/MN (Hereinafter referred to as the "The Suit Property).

The Appellant/Applicant opined that by granting this orders it would be to prevent and avoid a travesty of justice as the 1st Appellant as a retired teacher and senior citizen turned 75 years of age on 15th October, 2021 and lived solely on such rental income which had fallen in rental arrears in respect of the suit property where the Respondent carried on a Bar, Restaurant and Night Club among other businesses.

3. The 1st Appellant/Applicant is the registered owner of the said suit property Plot No. 3863/III/MN and lessor to the Respondents. The Appellants are the Defendants, while the Respondents are the Plaintiffs in the CMCC (Mombasa) E130 of 2020 instituted and heard before the lower court. (Hereinafter referred to as "The Sub-ordinate Trial Case")

4. The 1st Appellant, ANNANIAS NYAMU KIRAGU swore a 22 Paragraphed Supporting Affidavit on 2nd November 2020 and four (4) annexures marked as "A", "B", "C" and "D" annexed thereto. He maintained that the setting aside of the orders by the lower court, rendered him destitute and allowed the Respondents to continue to be in occupation and use of the suit premises for profit without paying rent, which had accumulated to over Kenya Shillings Eight Million (Kshs. 8, 000, 000.00). The 1st Appellant/Applicant averred that he was unable to meet her general expenses of a sum of Kenya Shillings Fifty Thousand (Kshs. 50,000/=) a month and her house rent which has accumulated to a sum of Kenya Shillings Three Hundred and Ninety Thousand (Kshs. 390,000/=) and she was facing evictions from the house.

5. He stated that on 25th March, 2021 the lower court, taking into consideration the provisions of Section 6 of the Arbitration Act made a ruling staying its proceedings and referred the dispute to an arbitration with all the rent in arrears being ordered to be paid to the Land Lord's Advocates and which was the correct thing to do. However, and to the amazement of the Appellant/Applicant on 30th September, 2021 the lower court set aside its own orders of 25th March 2021.

6. Being aggrieved by the decision of the lower Sub-ordinate trial case at the court of 30th September, 2021 the Appellant/Applicant decided to prefer this appeal on 29th October, 2021 vide a Memorandum of Appeal filed before this Honorable Court which is still pending

hearing and final determination.

7. He held that being a senior Citizen he only dependent on the income from the rented premises and no other source of income whatsoever and which rent remained unpaid since the month of June 2021 totaling to Kenya Shillings Eight Million (Kshs. 8,000,000/=). He opined that as a result he had been rendered destitute presently depending on well-wishers for food and other basic needs. He was at the verge of being disgraced and evicted from his rented residential house for falling in arrears to the tune of Kenya Shillings Three Hundred and Ninety Thousand (Kshs. 390,000/=) as of October, 2021.

8. The Appellant filed a further affidavit on 12th November 2021 to establish to court by annexing WhatsApp messages that her landlord was demanding rent on the residential house she was occupying. She has been asked to give vacant possession. She also annexed screenshots of text messages of M-shwari and KCB-Mpesa where she has borrowed loans in order to cover her daily expenses. She urged court to allow the application and grant her interim relief pending the determination of the appeal.

III. The Respondents case

9. The Respondents are seeking to bar the Appellants from distressing for rent arrears accruing over the suit premises. On 25th March 2021, the lower court stayed the suit, ordered the dispute to be referred to an arbitrator and directed the Respondents to deposit quarterly rent with the Appellant/Applicant's advocates until the hearing and determination of the arbitration proceedings. The Respondent then filed an application on 1st July 2021 seeking orders that the court reviews, sets aside or varies the orders of 25th March 2021 and the Respondents be allowed to be heard on their application dated 11th November 2020.

10. On 30th September 2021 the lower court allowed the application and set aside the orders of 25th March 2021, and stayed the orders granted therein pending the hearing and determination of the application dated 11th November 2020. The Appellant/Applicant being dissatisfied with the said ruling, filed a Memorandum of Appeal on 29th October 2021. The Appellants/Applicants seek the setting aside of the orders of the lower court issued on 30th September 2020 and the Respondent to be jointly and severally ordered to pay to court or the Appellant/Applicant's advocate client account the rent arrears amounting to a sum of Kenya Shillings Six Million Six Fifty Thousand (Kshs. 6,650,000/=) and all future rents.

IV. Analysis and determination

11. I have read carefully the pleadings herein and considered the written submissions made by Learned Counsel. This court is called upon to make a determination whether it can grant the orders sought by the Appellant/Applicant vide the Notice of Motion application dated 2nd November, 2021 at this interlocutory stage.

12. When this matter was mentioned on 24th January 2022 to confirm parties have filed written submissions to the application, Mr. Egunza, Counsel for the Respondents informed court that he has neither filed a replying affidavit nor submissions. The reasons given is that the Respondents are residing in Israel and that there is a live matter pending before the Sub-ordinate trial case at the lower court CMCC E130 of 2020, further the court has not given its direction on the appeal itself. Court directed the application to be ruled with or without the Respondents' responses, which I proceed to do.

13. The issue before me for determination is whether court ought to direct the Respondents to pay the Appellant/Applicant the sum of Kenya Shillings Eight Million (Kshs. 8,000,000/=) as rent arrears over the suit premises pending the hearing and determination of the appeal.

14. This interlocutory prayer is similar to the (c) sought in the Memorandum of Appeal dated 21st October 2021. The prayer seeks to order the Respondents to pay an outstanding rent arrears of a sum of Kenya Six Million Five Hundred Thousand (Kshs. 6,500,000/=) plus all future rent. I do not believe that this application falls under Order 40 Rule 11 as laid down by the Appellant/Applicant. The Appellant/Applicant is essentially asking court to grant final and determine some aspects of the appeal in an interlocutory application.

15. The **Court of Appeal case of "Olive Mwhiki Mugenda & another – Versus - Okiya Omtata Okoiti & 4 others [2016] eKLR**, held that only in exceptional circumstances shall court grant final orders at an interlocutory stage and reasons for granting such final orders must be stated. The court relied on a decision from India. It was held:- ***"In the Indian case of Deoraj - Versus - State of Maharashtra & others, Civil Appeal No. 2084 of 2004, it was held that balance of convenience and irreparable injury need to be demonstrated before interlocutory final orders can be granted. In the Indian case, it was stated that a court could grant such final interlocutory orders if failure to do so would prick the conscience of the court resulting in injustice being perpetrated throughout the hearing and at the end, the court would not be able to vindicate the cause of justice. In the case of "Ashok Kumar Bajpai – Versus - Dr. (Smt) Ranjama Baipai, AIR 2004, All 107, 2004 (1) AWC 88, at paragraph 17 of the decision the Indian Court expressed as follows:***

"...It is evident that the Court should not grant interim relief which amounts to final relief and in exceptional circumstances where the Court is satisfied that ultimately the petitioner is bound to succeed and fact-situation warrants granting such a relief, the Court may grant the relief but it must record reasons for passing such an order and make it clear as what are the special circumstances for which such a relief is being granted to a party."

16. This Court has intensely analyzed the application before it in comparison with the Memorandum of Appeal. There are no special circumstances that would warrant the granting of final orders at this interlocutory stage. The appeal ought to be heard by the court before such finality orders are granted. The appeal does not operate as a stay of the Sub-ordinate trial case at the lower court proceedings as indicated in Order 42 Rule 6. More to that, the Appellant/Applicant are yet to take directions before hearing as provided by Order 42 Rules 11 and 13. By seeking the finality orders at this stage, the Appellant/Applicant is asking court to grant final orders which would preempt the main appeal before its heard, which leads to injustice.

V. Conclusion and Disposition

17. Being aware of the relief sought in the main appeal, the Honorable Court cannot proceed to grant the similar orders at this interlocutory stage without giving directions on the appeal and hearing the parties. The Court reiterates that there are no special circumstances adduced by the Appellant/Applicant and I find no reason to do so. The Learned Magistrate in his ruling dated 30th September 2021, directed the Respondents herein to prosecute their application dated 11th November 2021. The main suit is still ongoing at the Sub-ordinate Lower Court as I have mentioned, no indication that the same has been stayed. Nonetheless, for the sake of justices, fairness, equity and conscience and the overruling principles vested in this Court under Article 159 (2) of Constitution of Kenya, Sections 3 and 13 of the Environment and Land Court Act, No. 19 of 2012 and Sections 101 of the Land Act, of 6 of 2012 and 150 of the Land Registration Act, No. 3 of 2012. Further to this and arising from the filed Memorandum of Appeal and for the interest of justice my discretion and grant stay of proceedings at the lower court awaiting the hearing and final determination of the Appeal.

18. Based on the above stated reasons, I therefore proceed to direct as follows:-

- a) **THAT the Notice of Motion application dated 2nd November, 2021 and the orders sought be and is hereby dismissed with no orders as to costs, since the Respondents did not participate in filing any pleadings.**
- b) **THAT in the interest of justice and equity there be stay of proceedings of the Sub - ordinate Court in CMCC No. E130 of 2020 pending the Hearing and determination of the filed Appeal dated 29th October, 2021.**
- c) **THAT Appellant be and is hereby granted Forty Five (45) days to have compiled and served the records of Appeal from the lower court with regard to the Ruling of CMCC No. E130 of 2020 of 30th September, 2021.**
- d) **THAT the Appellant to endeavor to fix the Appeal for taking of directions under the provisions of Section 79 B and G of the Civil Procedure Act Cap 21 and Order 42 Rules 11 and 13 of Civil Procedure Rules, 2010 within the next Forty Five (45) days from today.**
- e) **THAT there be stay of proceedings of the lower court in the CMCC No. E130 of 2020 pending the hearing and final determination of the Appeal.**

IT IS SO ORDERED ACCORDINGLY.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 15TH DAY OF MARCH 2022.

HON. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIROMNENT AND LAND COURT

MOMBASA

In the presence of:

M/s. Yumna Hassan, the Court Assistant.

M/s. Kimani holding brief for Mr. S. M. Kimani Advocate for the Appellants/Applicants.

No appearance Advocate for the Respondents.