



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL APPEAL NO. 110 OF 2013**

**VICKY MONGI .....APPELLANT**

**-V E R S U S-**

**ESTHER NGUNA CHANDA .....1<sup>ST</sup> RESPONDENT**

**JOHNSTONE K. MULI T/A**

**KITHEMU AUCTIONEERS .....2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Ruling/Order of the Resident Magistrate's Court dated 25<sup>th</sup> July 2013 in Mombasa RMCC No. 2337 of 2012) before Hon. R. Odenyo (PM).*

**RULING**

1. Appellant filed a case in Mombasa Chief Magistrate's Court, being **Civil Case No. 2337 of 2012** Appellant pleaded in that case that the Respondent had illegally, and contrary to the Rent Restriction Act Cap 296, increased her rent of her rented premises from Kshs. 14,000/- to Kshs. 20,000/-.
2. Appellant before the Chief Magistrate's Court further sought for orders of declaration that the said increase was illegal and sought a permanent injunction to restrain Respondent from levying distress for rent.
3. The said Court by its Ruling delivered on 25<sup>th</sup> July 2013 dismissed Appellant's application for interlocutory injunction on the ground that it had no jurisdiction to entertain the matter and that such jurisdiction was before the Environmental and Land Division Court. Appellant being aggrieved with that dismissal filed this appeal.
4. Appellant filed before this Court Notice of Motion dated 30<sup>th</sup> August 2013 seeking an injunction to restrain Respondent from distressing for rent pending the hearing and determination of this appeal. In the affidavit in support of that application Appellant deponed that she had an arguable appeal which would be rendered nugatory if an injunction as sought was not granted. Appellant also deponed that she has paid the undisputed rent to date and she intended to continue to pay it.
5. In submission in support of that application Appellant's Learned Counsel submitted that the

jurisprudence of Order 42 Rule 6(6) of the Civil Procedure Rules, under which the application was brought, was under-developed. Learned Counsel proposed that in considering the application the Court should look at whether there was an arguable appeal and if there was that the Court should grant orders to ensure the same is not rendered nugatory. Further he stated that whether or not the Court orders that security be provided was within the discretion of the Court.

6. On arguable appeal Learned Counsel set out the provisions of Cap 296 and argued that Appellant's case before the Chief Magistrate had merit. I decline to say any more on those arguments because the case is still pending before the Chief Magistrate's Court.
7. The Respondent submitted that Appellant's application had failed to set out what substantial loss she would suffer if an injunction was not granted.
8. Further Respondent submitted that Appellant filed the case in the Chief Magistrate's Court yet there was another case pending before this Court being **Mombasa HCCC No. 54 of 2011** involving the Plaintiff, 1<sup>st</sup> Defendant and another firm of auctioneers and not the 2<sup>nd</sup> Respondent herein.

### **ANALYSIS**

9. In my view an Appellant who seeks an injunction pending appeal should satisfy the following-

- **Show arguable appeal.**
- **Show they would suffer substantial loss if injunction was not granted.**
- **Should file the injunction application without delay.**
- **The Court at its discretion may order security be provided.**
- **The Court may consider where the balance of convenience lies.**

### **ARGUABLE APPEAL**

10. Having considered the parties submissions and the lower Court's Ruling I do find that Appellant's appeal is not without merit.

### **SUBSTANTIAL LOSS**

11. Appellant did not address what loss if any she will suffer if an injunction is not granted.

### **DELAY**

12. Appellant's application for injunction was filed without delay.

### **SECURITY**

13. As stated before, whether or not to order security to be provided by the Applicant ought to be at the Court's discretion. In this regard I will invoke the equitable maxim "**he who seeks equity must do equity.**" That maxim requires a Claimant who seeks equitable relief to act fairly towards the Respondent. Appellant seeks to restrain Respondent from distressing for rent until this appeal is heard and determined. 1<sup>st</sup> Respondent when she filed her Defence in the lower Court, on 25<sup>th</sup> November 2012, pleaded that Appellant had rent arrears of Kshs. 30,000/- which I presume was accumulated from the disputed rent. The arrears by now, since Appellant has not paid that disputed rent, must be in excess of Kshs. 200,000/-. Appellant in acting fairly towards Respondent ought to provide security for those arrears. It is for that reason that I will order

Appellant to deposit in Court Kshs. 100,000/- as a condition to granting an injunction.

**BALANCE OF CONVENIENCE**

14. Balance of convenience will best be served by granting a conditional injunction.

**CONCLUSION**

15. Accordingly I grant the following orders-

- a. **An injunction is hereby granted restraining the Respondents from levying distress for rent against Appellant in respect of property MOMBASA/BLOCK XVII/711 on condition that Appellant does deposit into this Court Kshs. 100,000/- within thirty (30) days from today.**
- b. **The costs of Notice of Motion dated 30<sup>th</sup> August 2013 shall abide with the outcome of this appeal.**

**DATED and DELIVERED at MOMBASA this 18<sup>TH</sup> day of SEPTEMBER, 2014.**

**MARY KASANGO**

**JUDGE**