



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL APPEAL NO. 116 OF 2014

FRANCIS ODHIAMBO OMONDI T/A
OMONDI & COMPANY ADVOCATES.....APPELLANT

VERSUS

NATIONAL BANK OF KENYA LIMITED.....1ST RESPONDENT
SEDCO CONSULTANTS LIMITED.....2ND RESPONDENT
ALFRED BURUCH BARGOTIO.....3RD RESPONDENT

RULING

1. The appellant has lodged an appeal against the decision of the Resident Magistrates Court dated 11th September 2014. The lower court dismissed the appellant's notice of motion seeking an injunction to restrain the respondent from allocating parking bay number 32 on land title Eldoret Municipality Block 4/88. The appellant had also sought orders to access the parking bay; and, a prohibitory injunction to restrain the respondents from locking him out of the parking.
2. Pending the hearing and determination of the appeal, the appellant has filed a notice of motion dated 30th September 2014. The primary prayer is for an order of temporary injunction to bar the respondents from allocating the parking bay or hindering his access to it. The motion is thus a mirror image of the one dismissed by the lower court. That is precisely why the respondents attack it for being *res judicata*.
3. The pith of the present motion is that the lower court erred in failing to appreciate that the appellant had a contractual right to the parking bay; and, that his rights ranked in priority to any other tenant over the parking. The appellant contends that he has an arguable appeal and unless the orders sought are granted, his appeal will be rendered otiose.
4. Those matters are buttressed in a deposition sworn by the appellant on 30th September 2014. He deposes as follows: That he is a tenant of the 1st respondent occupying 486 square feet on the second floor of the premises; that the 1st respondent allocated him the car park on 14th December 2009; that on 1st August 2014 the 2nd and 3rd Respondents barred him from using the parking lot. The appellant contends that those actions contravened the contract because he had paid to the respondents rent of Kshs. 2,400/- for the period ending 30th September 2014. The tenancy was renewable and payable with rent. Lastly, the appellant alleges vendetta in the actions of the respondents. He assigns it to a suit he brought against the 2nd and 3rd respondents over a different matter particularized in the annexure marked FO 13.

5. The motion is contested. The respondents deny the allegations *in toto*. They contend that the appeal is hopeless. The respondents have filed grounds of opposition and two replying affidavits. The grounds raise three matters: first, that the application offends the provisions of Section 6 and 7 of the Civil Procedure Act; secondly, that there is no lease between the appellant and the 1st respondent over the suit premises. Accordingly, the appellant's relationship with the 1st respondent should be governed by the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. The respondents' case is that the right forum to determine the dispute is the Business Premises Rent Tribunal. Thirdly, and lastly, the motion is impugned for being frivolous, vexatious and an abuse of court process.

6. The two replying affidavits can be summarized as follows. First, that the orders sought by the appellant have been overtaken by events as the parking bay has been reserved for a different tenant. This resulted from failure by the appellant to obtain a car park sticker and well before the ill-fated suit in the subordinate court. Secondly, it is contended that in the absence of a lease, the respondents cannot be compelled to provide the service; thirdly, that the allegations of a vendetta are a red herring; and, fourthly, that the appellant is the author of his own misfortune by failing to obtain the parking sticker.

7. On 8th October 2014, I heard arguments from the learned counsels for the parties. I have considered the pleadings, depositions and rival submissions. The main suit in the lower court is still pending. The appeal in this matter is also pending. Whether the appeal has merit will be the true province of the appellate court. But in a matter of this nature, it is imperative to establish whether the appeal is arguable; and if so, whether failure to grant the reliefs sought will render the appeal nugatory.

8. In Hashmuklal Virchand and another v Investment & Mortgages Bank Limited Nairobi, Court of Appeal, Civil App. No. 94 of 2014 [2014] eKLR, the Court, while dealing with an application for stay under its Rule 5(2)(b), held as follows-

“On the issue of the intended appeal being arguable, it is now trite that an arguable point need not be one which will succeed, but one which is worth of the Courts' interrogation (see the case of Joseph Gitahi Gachau & Another versus Planner Holdings (a) Ltd & 2 Others Civil Application No. 124 of 2008) and Stanley Kangethe Kinyanjui versus Tony Ketter and 5 others [2013] eKLR). Secondly that existence of a solitary bona fide arguable point will suffice (see the case of Damji Pragji Mandavia versus Sara Lee House Hold & Body Car (K) Ltd. Civil Application No. Nai 345 of 2004); that an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before that court, one which is not frivolous. See (Joseph Gitahi Gachau & Another versus Pioneer Holdings (a) Ltd & 2 Others (Civil Application No. 124 of 2008))”

9. This motion is predicated on Order 40 rule 2 and Order 42 rule 6 of the Civil Procedure Rules 2010. Order 40 rule 2 entitles an applicant to an injunction to restrain breach of contract; Order 42 rule 6 sets the conditions for grant of stay pending appeals from decrees and orders. I will now turn to the requirements of both orders.

10. The principles governing the grant of prohibitive injunctions are well settled. A litigant must rise to the threshold laid in Giella v Cassman Brown and Company Limited [1973] E.A 358. Those principles are first, that the applicant must show a *prima facie* case with a probability of success; secondly that he stands to suffer irreparable harm not compensable in damages; and thirdly, if in doubt, the court must assess the balance of convenience.

11. The conditions for grant of a mandatory injunction on the other hand go beyond a *prima facie* case. The court must have a high sense of assurance that the plaintiff would be entitled to the same relief at the trial. See Shepherd Homes v Sandham [1970] 3 ALL ER 402, Locabail International vs Agro Export [1986]1 ALL ER 901 and Mucuha vs Ripples Limited [1990-1994] EA 388.

12. To succeed in an application for stay pending appeal, the applicant must meet the threshold set in Order 42 of the Rules. The application must be brought without delay; the applicant must demonstrate that he would suffer substantial loss; and, the applicant should provide security for due performance of the decree.

13. Applying those principles to the matter at hand, I find as follows. It is not disputed that the appellant is a tenant of the 1st respondent. The appellant occupies 486 square feet on the second floor of the demised premises. It is not also seriously contested that the appellant has not executed a formal lease; at any rate no formal lease has been registered against the title. It is also common ground that the appellant has been meeting his rent and was up to date as at 30th September 2014 when this appeal was lodged. I am also satisfied from annexure FO 9 (a) and (b) to the supporting affidavit that he had paid Kshs 2,400 for the parking bay for the period ending 30th September 2014. The 1st respondent has been accepting the rent.

14. I have seen a notice of change of particulars of a business transferring the firm of Wanga & Company to the appellant. As the record of appeal has not been filed, I am unable to tell whether the notice was before the lower court. It was certainly not exhibited in the affidavit in support of the motion in the lower court sworn on 11th August 2014. At paragraph 6 of the plaint, the appellant had stated that he used to be a *sub-tenant* of Eldo-Information Services and was trading as *Wanga & Company Advocates*. On 22nd September 2004 he applied to the 1st defendant for space in the demised premises. To that extent, and considering the evidence that was before the lower court, I cannot entirely fault the learned trial Magistrate for finding that “there was no evidence that M/s. Wanga & Company Advocates and M/s Omondi Advocates were the same”. What now emerges is that the appellant has introduced exhibits FO1 (a) and (b) at this appeal to clarify the relationship between the two business names. It will be province of the appellate court to determine the place and value of those annexures.

15. The grounds of opposition urged by the respondents are not without foundation. This suit relates to an interest in land; and on the face of it, and in the absence of a registered lease, the appellant would seem to be a *protected tenant*. This is conceded by the appellant at paragraph 8 of the plaint filed in the lower court. He pleads categorically that from 22nd May 2006 he “became a protected tenant within the meaning of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act”. Considering the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act and the Environment and Land Court Act (No. 19 of 2011), there is lingering doubt about the jurisdiction of the High Court to determine the present dispute. See *Sudi Chemical Industries Limited and others v Shaima Investments Limited* Nairobi, High Court case 185 of 2008 [2009] eKLR. But I say so very carefully and without making a finding. And the less I say about it the better. I should not pre-empt the appeal.

16. The allegations of a vendetta against the appellant do not *seem* well founded. It may well be true that the respondents are not acting in good faith. But the previous litigation between the parties was over a different cause of action. The reasons proffered by the respondents for denying the appellant the use of the parking- the failure to acquire a car sticker - are also feeble. It is also not lost on me that in the absence of a formal lease or tenancy agreement, the terms of the tenancy are not clear cut. That may explain why the learned trial Magistrate opined that specific performance could not issue.

17. The parking bay has been reserved for the 1st respondent’s cash-in-transit vehicles or its other vehicles. The appellant contends that he has no alternative or safe parking. Those facts are disputed on either side. The main suit in the lower court is as yet to be heard on its merits. Taking into account my analysis of the evidence before me and the principles of law, the appellant *may* not have a strong prima facie case. However, the *balance of convenience* would seem to tilt in his favour.

18. Purely from an economic standpoint, it is difficult to say that the appellant has established *substantial loss*. And considering the lingering question of jurisdiction, the appeal *may* not be on a firm footing. But that is not to say that there is no *arguable appeal*. One issue that invites the Court’s interrogation is whether a landlord who has accepted the rent for a parking bay, and considering the rent is up to date, can lock out the tenant notwithstanding the absence of a formal lease. I am also reminded that *an arguable point need not be one which will succeed, but one which is worth of the Courts’ interrogation*. See *Hashmuklal Virchand and another v Investment & Mortgages Bank Limited* Nairobi, Court of Appeal, Civil App. No. 94 of 2014 [2014] eKLR.

19. Whether or not to grant an injunction remains the discretion of the Court. The applicant has

regurgitated the same motion that was dismissed by the lower court. I would not entirely agree that it is *res judicata*. I am alive that a party who has just lost an application for injunction *may* be entitled to apply for injunction pending appeal. See *Erinford Properties vs Cheshire* [1974] 2 ALL ER 448 which has been domesticated by leading local decisions in *Butt vs Rent Restriction Tribunal* [1982] KLR 417 and *Madhupaper International vs Kerr* [1985] KLR 840. If the injunction sought is not granted, the appellant, who has met his rent obligations for the parking bay, will be completely shut out from the parking. If the parking lot is allocated to another party, the appeal may be rendered otiose.

20. I am thus prepared, in the interests of justice, to grant a conditional injunction pending appeal. The respondents are hereby restrained by injunction from allocating parking bay number 32 on land title Eldoret Municipality Block 4/88 to any other person other than the appellant pending the hearing of this appeal. The respondents are also restrained from preventing the appellant from accessing the parking bay pending the hearing and determination of this appeal. The injunctions are granted on the *condition* that the appellant deposits security in the sum of Kshs 50,000 in Court or in a joint interest earning account of the parties or their counsel within 7 days of the date hereof.

21. For the avoidance of doubt, the appellant shall continue to meet his rent obligations for the parking bay. The appellant shall also take steps to have the appeal admitted, directions taken and the hearing concluded within one year. In default, the orders of injunction shall lapse automatically. The costs of the motion shall abide the appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 23rd day of October 2014.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:-

Ms G.B. Shilwatso for Mr. Magare for the appellant instructed by Magare Musundi & Company Advocates.

Mr. B. K. Lang'at for the respondents instructed by Mburu Maina & Company Advocates.

Mr. J. Kemboi, Court clerk.