



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT**

**AT MOMBASA**

**ELC APPEAL NO. 25 OF 2021**

**SAID HAMISI KAZIMZURI.....APPELLANT**

**VERSUS**

**NORTH COAST DEVELOPMENT COMPANY LIMITED.....RESPONDENT**

**RULING**

**I. Introduction**

1. The Notice of Motion application dated 11<sup>th</sup> June 2021 for this Court's determination is the one filed by the Appellant/Applicant herein. It was brought under the provision of Sections 1A, 1B and 3A of the Civil Procedure Act, Cap. 21 of the Laws of Kenya, Order 42 Rule 6 (6) of the Civil Procedure Rules, 2010.

**II. The Appellant/Applicant's case.**

2. The Appellant/Applicant seeks for the following orders:-

a) Spend.

b) **That a temporary injunction be granted restraining the Respondent whether by itself, its servants, agents or otherwise howsoever from competing the distress levied upon the Appellant's goods pending the hearing and determination of the appeal herein.**

c) Spend.

d) **That the costs of this application be provided for.**

3. The application is premised on the facts, testimony, grounds and averments on the face of the ten (10) Paragraphed Supported Affidavit by SAID HAMISI KAZIMZURI and the four (4) annexures Marked as "SHK – 1 to 4". The Appellant/Applicant stated that he was dissatisfied with the ruling and orders made on 28<sup>th</sup> May 2021 by the sub – ordinate trial court of Honorable Kiage in Mombasa CMC ELC 1 of 2021 and wished to prefer an appeal against the said decision. He held that the Respondent filed a suit against him in the CMCC (Mombasa) No. 113 of 2019 seeking for eviction orders against him from the suit premises Plot Numbers Mombasa/BLOCK XLVI/138 as according to the Respondent the Appellant's occupation on the suit land was illegal. Hence, in essence there were two suits over the same subject matter pending at different court offending the doctrine of Sub Judice and Section 6 of the Civil Procedure Act, Cap. 21.

4. He proceeded to attach a handwritten ruling and averred that the same had not been typed. He further claimed that if the stay orders were not granted, the said appeal would be rendered nugatory and he stood to suffer substantial loss in form of distress for rent. He further maintained that the distress for rent was illegal and there was no rent in arrears since there was no Landlord - Tenant relationship existing between the Respondent and him.

5. It was the Appellant/Applicant's case that there were two (2) different suits still pending at the Magistrate's court between the Respondent and himself. To demonstrate this fact, he annexed a Complaint dated 30<sup>th</sup> July 2019 and marked as "SHK - 2 in the **"CM ELC 113 of 2019 North Coast Development Company Limited – Versus - Said Hamisi Kazimzuri**". This is where the Respondent instituted a suit against the Appellant allegedly for trespass and illegal occupation and prayed for vacant possession over Mombasa/Block XLVI/138. The Appellant annexed a copy of a proclamation of attachment marked "SHK – 3", and averred that on 23<sup>rd</sup> December 2020 the Respondent levied distress for rent against the Appellant despite claiming he was a trespasser.

6. The Appellant claimed that, out of the imminent attachment of his household goods he filed a suit against the Respondent vide a Plaint dated 4<sup>th</sup> January 2021 in the case of “**CM ELC No. 1 of 2021 Said Hamisi Kazimzuri – Versus - North Coast Development Company Limited**. Where he sought an injunction to restrain the Defendant from levying distress upon his property. The court vide its ruling delivered on 27<sup>th</sup> May 2021 struck out the suit for offending Section 6 of the Civil Procedure Act, cap. 21. The Appellant argued that the two suits are litigating on different issues and he wishes to appeal against the said ruling in order to prevent the respondent from levying distress for rent against his property.

### **III. The Respondent’s case**

7. The Respondent responded to the application vide a nine (9) Paragraphed Replying Affidavit dated 5<sup>th</sup> July 2021 and sworn by AHMED SALIM SALMAAN the Respondent’s general manager. He deponed that the application was without any merit on the ground that CM ELC No. 1 of 2021 was Sub judice to the ELC CMCC No. 113 of 2019. The parties in this appeal and the original CMCC (ELC) No. 1 of 2021 Mombasa were also parties in a pending suit CMCC No. 113 of 2019 Mombasa over the same subject matter being the occupation, possession, use and ownership of the suit land was in dispute in two cases. He held that the determination of this appeal in favour of the Appellant would directly affect the outcome of the pending suit in CMCC No. 113 of 2019 thus rendering it futile and nugatory before parties proceed for full trial. He held that the relief sought and/or the issue in dispute in this appeal and the original suit could equally be resolved and adjudicated in CMCC No. 113 of 2019 Mombasa which was yet to proceed for full hearing. He held that there would be great confusion and conflicting decisions in the long run.

8. He argued that this appeal would subject the Respondent to irreparable loss since they would be subjected to an injustice and conflicting decisions of two concurrent courts. He argued that the Appellant was abusing the court process by seeking conflicting orders from court despite there being a pending suit in court. He urged court to dismiss the application with costs.

### **IV. Submission**

9. On 28<sup>th</sup> October, 2021 when all the parties were present in court, they were directed to have the Notice of Motion application dated 11<sup>th</sup> June, 2021 be canvassed by way of written submissions. Subsequently, all the parties obliged.

#### **A. The Appellant/Applicant’s Written Submissions**

10. On 30<sup>th</sup> September, 2021 the Learned Counsel for the Appellant/Applicant the law firm of Messrs. Kamoti Omollo & Company Advocates filed their Written submissions of even date in support of the application. Mr. Omollo Advocate submitted that the powers to grant an injunction pending appeal are discretionary and must be exercised judiciously on the basis of law and evidence. He relied on the case of “**Patricia Njeri & 3 others – Versus - National Museum of Kenya (2004) eKLR**, where the principles applicable were discussed as the discretion will be exercised against an Applicant whose appeal is frivolous, the discretion will be refused where it would inflict greater hardship than it would avoid, the Applicant must show that to refuse the injunction would render his appeal nugatory and the court will be guided by the principles in the case of “**Giella – Versus - Cassman Brown**. The Learned Counsel argued that the injunction is needed to restrain the Respondent from distressing the Appellant’s goods and rendering the appeal nugatory. The hallmark of the Appellant’s case was that there was no landlord and Tenant relationship between the Respondent and the Appellant. That no rent was due from the Appellant to the Respondent. Therefore, the Respondent had no right to levy distress for rent against the Appellant.

11. The Learned Counsel argued that the impugned ruling of the Learned magistrate struck out the Appellant’s suit on the ground that the suit offended the provision of Section 6 of the Civil Procedure Act, cap. 21 of the Laws of Kenya. To buttress its contention they relied on the decision of “**Republic – Paul Kihara Kariuki, the Attorney General & 2 Other Ex Parte Law Society of Kenya (2020) eKLR** where court held that Sub – Judice rule like other maxims of law has a salutary purpose. The basic purpose and underlying object was to prevent the courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon parallel litigations in respect of the same cause of action, same subject matter and the same relief. They also cited the case of “**Child Welfare Society of Kenya – versus Republic Ex - parte Child in Focus Kenya & AG & Other (2017) eKLR and Joseph Siro Moriomomo – Versus – Housing Finance Company of Kenya Nairobi HCCC No. 265 of 2007 (2008) eKLR**”. He submitted that on appeal the Appellant will prove to court that the two suits are not related, and in no way is the appeal a frivolous one but rather an exercise of the his right of appeal.

#### **B. The Respondent’s Written Submission.**

12. The Learned Counsel for the Respondent, the Law firm of Messrs. Wandai Matheka & Company Advocates filed their written submissions on 11<sup>th</sup> January 2022. M/s. Maiga Advocate submitted that the Appellant had offended the doctrine of sub judice by exercising multiplicity of suits at the prejudice of the Respondent. She argued that there was pending suit being CM ELC No. 1 of 2021 and CM ELC No. 113 of 2019 were all litigating on the same parties and same subject matter (title) which is occupation of all that parcel of land known as Plot Mombasa/Block XLVI/138 and the outcome of this appeal is in favour of the Appellant would directly and substantially affect the outcome and directions of the pending suit in CMCC (Mombasa) No. 113 of 2019, and nothing stopped the Appellant from seeking injunctive orders in No. 113 of 2019. She opined that the Appellant was exercising multiplicity of suits at the prejudice of the Respondent. On this issue they cited the cases of “**Nyanza Garage Limited – Versus – Attorney General HCCC No. 450 of 1993**” and “**Barclays bank of Kenya Limited – Versus – Elizabeth Agidza & 2 Others (2012) eKLR**” where the Court held:-

***“...if the controversy in subsequent suit can be conveniently and properly adjudicated upon in the previous suit, by virtue of the enactment of Section 1A and 1B of the Civil Procedure Act, Section 6 will still apply. This is because the overriding Objective of the Civil Procedure Act is for expeditious and proportionate resolution of civil dispute between parties.....”***

13. Therefore, she argued that the Appellant was not entitled to the interim injunctive relief as the application offended the rule of Sub Judice making the court lack jurisdiction to grant any such orders under the principles set out in the case of “**Patricia Njeri & Other – Versus – National Museum of Kenya (2004) eKLR**. He further argued that instead the appellant chose to file a frivolous suit No. 1 of

2021. The Learned Counsel urged court to find granting an injunction pending appeal, in an appeal which was frivolous would inflict greater injustice than it would avoid. She urged court to dismiss the application with costs.

#### V. Analysis and Determination

14. I have read and carefully considered all the filed pleadings, the written Submissions, the cited authorities and the relevant provisions of the law. In order to arrive at an informed, just and fair decision in this case, I have framed the following three (3) salient issues for determination. These are:-

**a) Whether the Appellant through its Notice of Motion application dated 11<sup>th</sup> June, 2021 meets the well established threshold for granting Injunctive Orders under the provisions of Order 42 Rules 6 (6) of the Civil Procedure Rules, 2010.**

**b) Whether the Appellant is entitled to be granted the temporary Injunctive orders under the provisions of Order 42 Rule 6 (6) of the Civil Procedure Rules, 2010.**

**c) Who will meet the Costs of the application.**

**ISSUE a). Whether the Appellant through its Notice of Motion application dated 11<sup>th</sup> June, 2021 meets the well established threshold for granting Injunctive Orders under the provisions of Order 42 Rules 6 (6) of the Civil Procedure Rules, 2010.**

15. Undoubtedly, this court has jurisdiction to grant an injunction pending appeal under the provision of law. Under the provisions of Order 42 Rule 6 (6) of the Civil Procedure Rules, 2010 provides for the conditions to be met for the exercise of it. The Rule provides:-

**Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.**

16. To break the above Order 42 Rule 6 of the Civil Procedure Rules, 2010 for an applicant to satisfy court that he or she deserves to be granted the relief of interim injunctive orders the law envisages that the procedure for instituting an appeal from a Sub ordinate Court or tribunal has to have been Complied with. First and foremost, two fundamental ingredients have to be fulfilled. These are: a). there ought to be a filed appeal from the sub – ordinate court or Tribunal; and;

b). The procedure on assessing the appeal then follows. This procedure entails the Appellant filing a Notice of Appeal, a Memorandum of Appeal and compilation of the records of appeal with all the proceedings and the ruling or Judgement it seeks to appeal against to be contained thereof.

17. Thereafter, the Appellate Court has to provide directions on the filed appeal to be taken under the provisions of Section 79 B and G of the Civil Procedure Act, Cap. 21 and Order 42 Rules 11 and 13 of the Civil Procedure Rules, 2010. There should be no omission of any of these crucial relevant materials that the court would have needed to evaluate. The application for injunction has to make full disclosure of material facts of the appeal otherwise anything short of this means no injunctive orders can be granted whatsoever.

**ISSUE b). Whether the Appellant is entitled to be granted the temporary Injunctive orders under the provisions of Order 42 Rule 6 (6) of the Civil Procedure Rules, 2010.**

18. From the reading of the Rule, the above stated conditions that a party seeking injunction pending appeal should met, for court to exercise its discretion is to comply with the procedure for instituting an appeal from the lower court. Even where the applicant has complied, an injunction will be granted upon such terms as the court may think is just. It is a matter for this court's discretion, which should be exercised judicially and not in a capricious or arbitrary fashion.

19. The decision the Appellant is seeking to appeal against emanates from the ruling of the Sub Ordinate Court granted on 27<sup>th</sup> May 2021. The Appellant/Applicant has annexed a copy of the handwritten ruling of the Learned Magistrate. From the facts on record, it is rater clear that the Appellant has not lodged a Memorandum of Appeal nor compiled any Records of Appeal as envisaged by law. For all intent and purposes, the Appellant has not satisfied the first condition set out in Order 42 Rule 6 (6) of Civil Procedure Rules, 2010. In other words, he has failed to comply with the procedure of instituting an appeal.

20. Going further, for whatever its worth, this Honorable court cannot rely on a handwritten copy of the ruling to evaluate the basis of the Learned Magistrate. The Appellant ought to have supplied court with a true and certified copies of the typed ruling that he seeks to appeal against. But first and foremost, the Appellant ought to have filed a Memorandum of Appeal, for without it being there, then there is no appeal. This legal preposition is strong supported in the case of “**Juliet Kwamboka Ongwae t/a Kahawa Kulture – Versus - Mocha Place Limited [2018] eKLR** the court dismissed an application for injunction pending appeal and held, *inter alia*:-

**“Nonetheless, even if a prayer for injunction had been made by the applicant, the court would not have been in a position to grant the same as there was omission of crucial relevant materials that the court would have needed to evaluate. The ruling sought to be appealed from was not annexed; the pleadings in the lower court were not equally annexed; and neither was the lease agreement between the parties which was the genesis of the dispute between the appellant and the respondent. The application for injunction was therefore bound to fail on account of material none disclosure.”**

21. For this very primary reason, the Notice of Motion application by the Appellant/Applicant dated 11<sup>th</sup> June, 2020 cannot succeed at all as

it totally goes against the strong waves and ingrains of the fundamental principles of law graphically spelt out here.

All said and done, the Honorable court has jurisdiction in pursuit and interest of Justice, Equity and Conscience, the powers vested in it from the provisions of Article 159 (1) and (2) of the Constitution of Kenya, Sections 313 and 19 of the Environment and Land Court Act, No. 19 of 2011, Sections 101 of the Land Registration Act No. 3 of the 2012 and Section 150 of the Land Act, No. 6 of the 2012 to retain the intended appeal by Appellant. In so doing, it has also considered the principles enshrined under the decision of “**Butt –Versus - Rent Restrictions Tribunal (1979) eKLR**” where the Court of Appeal considered a similar application as in this instant case and held that this court has jurisdiction to grant an injunction pending appeal in order to preserve the appeal and the subject matter of appeal even after dismissing an application for injunction.

**Conclusion and Disposition**

22. Based on the above in depth and elaborate analysis, this Honorable Court proceeds to make the following findings and directions. These are:-

**THAT** the Notice of Motion application dated 11<sup>th</sup> June 2021 filed by the Appellant/Applicant lacks any merit for failing to fully comply and/or adhere with the provisions of Order 42 Rule 6 (6) of the Civil Procedure Rules, 2010 and hence it be and is hereby dismissed with costs to the Respondent.

**THAT** Appellant be and is hereby granted 14 days leave to have filed and served a Memorandum of Appeal against the ruling delivered on 28<sup>th</sup> May 2021 by the sub – ordinate trial court in Mombasa CMC ELC 1 of 2021.

**THAT** the Appellant is directed to closely liaise with the Chief Court Administrator to ensure that there are true and Certified copies of the typed proceedings with the next forty five (45) days from the date of this ruling hereof.

**THAT** thereafter upon obtaining the proceedings, to have compiled, filed and served a Record of Appeal within the next 14 days.

**THAT** this matter to be mentioned on 8<sup>th</sup> June, 2022, unless otherwise stated, for purposes of taking Court’s direction on the Appeal under the provisions of Section 79B and G and Order 42 Rules 11 and 13 of the Civil Procedure Rules, 2010.

**THAT** the Costs of the application to be borne by the Respondent.

23. IT IS SO ORDERED ACCORDINGLY.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH DAY OF MARCH 2022.

.....

HON. JUSTICE L. L. NAIKUNI

JUDGE

ENVIRONMENT AND LAND COURT

**MOMBASA**

**IN THE PRESENCE OF:-**

**MR. OMOLLO ADVOCATE FOR THE APPELLANT/APPLICANT**

**M/S. MAIGA ADVOCATE FOR THE RESPONDENT**