



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC CIVIL APPEAL NO. 1 OF 2022

UMAR AUTO GARAGE NEW & SECONDHAND SPARES LIMITED.....APPELLANT/APPLICANT

VERSUS

GITHERE INVESTMENTS LIMITEDRESPONDENT

RULING

(In respect of the Notice of Motion Application dated 16th December 2021 seeking an order of temporary injunction pending the hearing and determination of an appeal)

BACKGROUND

1. Before me is the Appellant/Applicant's Notice of Motion dated 16th December 2021. The Appellant/Applicant prays for an order to restrain the Respondent, their servants, agents and or assignees from evicting the Applicant/Appellant and its employees and or agents from L.R No. 2259/2271 Karen, Nairobi and or in any other way harassing them and or interfering in the Applicant/Appellant's quiet possession and use of the premises situate at L.R No. 2259/2271, Karen, Nairobi pending the hearing and determination of the Appellant's Appeal against the ruling and order made by Hon. D.W Mburu (Mr.) Senior Principal magistrate on 10th December 2021.
2. The Appellant/Applicant also prays that the OCS Karen Police Station be directed to assist and ensure compliance by the Respondents.
3. The Applicant/Appellant has enumerated the grounds upon which its application is premised on the face of the application. The Applicant/Appellant has filed an appeal against the ruling of the Senior Principal Magistrate that denied it orders of interim injunction in the case before the Milimani Chief Magistrate's Court (Milimani CMC ELC No. E419 2020). The Applicant/Appellant avers that unless issued with the restraining order, it will suffer substantial loss and the appeal pending before this court will be rendered nugatory.
4. The Applicant/Appellant's application is brought under the provisions of Sections 1A & 1B of the Civil Procedure Act and Order 40 Rules 1 & 2 & Order 42 Rule 6. It is supported by the affidavit of Mohammed Raffi Rajput sworn on 16th December 2021 and the supplementary affidavit by the same deponent sworn on 24/2/2022.
5. The Application is opposed by the Respondent by way of a replying affidavit sworn by Grace Githere on 4th February 2022 and a further affidavit sworn on 4th March 2022 by the same deponent. The Respondent avers that the Applicant/Appellant has not come to court with clean hands since it is in rent arrears which continue to accrue. The Respondent urges the court not to aid the Applicant/Appellant in perpetuating the injustice.
6. The Respondent further states that the lease between it and the Applicant/Appellant has since lapsed. Additionally that the distress for rent carried out was lawful as the law allows a landlord to levy distress against a defaulting tenant.
7. According to the Respondent, the Applicant/Appellant is no longer its legal tenant. It is the Respondent's position that the Applicant/appellant had vide its letters of 12th January 2021 communicated that it had no intention of renewing the lease.

Court's directions.

8. The court directed that the application herein be disposed of by way of written submissions. Both parties complied and the court has had the opportunity to peruse the same together with the cited authorities.

Issues for Determination

9. In the court's opinion, the issues for determination in this matter are:

- a) *Whether an order of interim injunction may be granted pending appeal.*
- b) *Whether the Applicant has satisfied the test for the grant of an order of interim injunction pending appeal.*

Analysis and Determination

10. In this ruling, I will be frugal with my words in view of the pending appeal and also the matter yet to be heard before the Magistrate's Court in order not to prejudice the outcome of the said matters and or embarrass the respective courts.

A. WHETHER AN ORDER OF INTERIM INJUNCTION MAY BE GRANTED PENDING APPEAL.

11. Order 42, Rule 6 of the Civil Procedure Rules empowers this court in exercising its appellate jurisdiction to grant a temporary injunction. The rule provides that:-

“(6)Notwithstanding anything contained in sub rule (1) of this rule, the High Court shall have power in 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 a tribunal has been complied with.”

12. Rule 6 is clear and needs no expounding. Where the procedure for instituting an appeal has been complied with the court may exercise its discretion to grant a temporary injunction. As this court stated in the case of **Kenya Harlequin Football Club Vs Quaco Two Hundred and Thirty Two Ltd & Another (2022) eKLR**, under the provisions of order 42 rule (1), appeals to the High Court (and courts of equal status off course), are in the form of a memorandum of appeal signed in the same manner as a pleading.

13. A party will therefore be considered to have complied with the procedure for instituting an appeal (from a subordinate court or a tribunal) when he/she files a memorandum of appeal in accordance with the provisions of order 42.

14. So, in deserving cases, an order of interim injunction may be granted where the procedure for instituting an appeal has been complied with by the Applicant.

B. WHETHER THE APPLICANT IN THIS CASE HAS SATISFIED THE TEST FOR THE GRANT OF AN ORDER OF INTERIM INJUNCTION.

15. Justice Visram J (as he then was), while considering an application similar to the one before me in the case of **Patricia Njeri & 3 others vs National Museum of Kenya (2004) eKLR**, spelt out the principles to be followed in considering an application for an interim injunction pending appeal. He stated that the power of the court to grant any order of temporary injunction is discretionary. Discretion must however be exercised judicially and not in a whimsical or arbitrary fashion.

16. The exercise of that discretion should be guided by certain principles as follows:-

- a) *The discretion will be exercised against an Applicant whose appeal is frivolous.*
- b) *The discretion should be refused where it would inflict greater hardship than it would avoid.*
- c) *The Applicant must show that to refuse the injunction would render his appeal nugatory.*
- d) *The court should be guided by the principles in Giella Vs Cassman Brown & Company Ltd (1973) EA 358.*

17. The basis of the relationship between the Appellant/Applicant and the Respondent in this matter is the lease agreement dated 1st October 2013, exhibited by the Applicant/Appellant and marked 'MRR1'. The term of the lease was five (5) years and three (3) months from the 1st October 2015.

18. It is not in dispute that the term of the lease has expired. Paragraph 9 of the exhibited lease is categorical on what was to happen upon expiry of the term of the lease. The paragraph provided that,

“The lessee will at the expiration or sooner on determination of the term hereby created peaceably and quietly yield up the leased portion in good and tenantable repair and condition and in the same state of condition as it was at the commencement of the term hereby created.”

19. Parties are bound by the terms of their contract. Both parties confirm having entered into the lease agreement. They are accordingly bound by its terms.

20. My finding is that the Applicant/Appellant has not established a prima facie case with a probability of success. The lease upon which its claim is founded is long expired. Its continued stay on the Respondent's premises is unjustifiable. The Applicant therefore has not met the test for the grant of an order of interim injunction pending the hearing and determination of the Appeal.

21. I hereby dismiss the Notice of Motion Application dated 16th December 2021 with costs.

It is so ordered.

Dated, signed and delivered at Nairobi this 21st day of April 2022.

M.D MWANGI

JUDGE

In the Virtual Presence of:-

Mr. Kirika h/b for Kimathi for the Applicant

Mr. Mungai for the Respondent

Court Assistant: Hilda

M.D MWANGI

JUDGE