



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

APPEAL NO. 54 OF 2021

AFRICAN SHOWCASE LIMITED APPELLANT

VERSUS

ASTLEY PROPERTIES LIMITED1ST RESPONDENT

EVANS MAABI T/S MURPHY MERCHANTS AUCTIONEERS 2ND RESPONDENT

RULING

(Application for stay pending appeal; principles to be considered; applicant being tenant of the 1st respondent; 1st respondent claiming rent arrears and moving to levy distress; applicant filing suit before the Magistrate's court to declare the distress illegal and filing an application for injunction; 1st respondent filing an application of her own seeking orders for the applicant to deposit the claimed rent arrears; Magistrate dismissing the application for injunction and further ordering the applicant to deposit the rent arrears; applicant aggrieved and filing appeal and seeking stay of the Magistrate's orders pending appeal; stay granted on condition that the applicant deposits the claimed rent arrears)

1. There are two applications before me filed by the appellant. The first is an application dated 8 September 2021 and the second is the application dated 24 September 2021. The substantive prayer in the application dated 8 September 2021 is to stay the orders of 26 August 2021 made by the trial Magistrate and to restrain the respondents from levying distress or interfering with tenancy and occupation of the applicant on the property LR No. 3110/1/MN pending the hearing and determination of this appeal. The application dated 24 September 2021 seeks a myriad of orders arising out of seizure of the goods of the applicant by the respondents in levy of distress for rent but basically the applicant wants orders to stop the sale of the goods and for the process of distress to be set aside.

2. To put matters into context, the applicant has been a tenant of the 1st respondent in the premises LR No. 3110/1/MN. There appears to have been default in payment of rent and the 1st respondent appointed the 2nd respondent (a firm of auctioneers) to levy distress. On 24 May 2021, the applicant filed a plaint in the Chief Magistrate's Court at Mombasa seeking orders inter alia to declare the distress unlawful. Together with the plaint, the applicant filed an application seeking orders of injunction to stop the levy of distress pending hearing of the suit and to order the 1st respondent to restore water and electricity to the premises. The 1st respondent opposed the application for injunction, asserting that it had a right to levy distress, as the applicant was in arrears of rent and service charge. The 1st respondent also filed an application of her own seeking orders to have the applicant deposit rent arrears of Ksh. 5, 349,159.40/= which she claimed was the amount due as at May 2021. In a ruling delivered on 26 August 2021, the learned Magistrate found that the applicant was in arrears of rent and dismissed the applicant's application for injunction. He allowed the 1st respondent's application seeking for deposit of rent arrears and gave 14 days for the applicant to do so.

3. Aggrieved by the ruling, the applicant filed this appeal and contemporaneously filed the application dated 8 September 2021, seeking to stay the orders of 26 August 2021, and to stop any further distress of rent. The application first came before Olola J, as the duty Judge, on 10 September 2021. He granted an interim order of stay subject to the applicant depositing 50% of the sum of Kshs. 5,349,159.40/= within 14 days and henceforth for the applicant to pay rent at 70%. It appears as if these amounts were not deposited and the respondents collected the applicant's goods in levy of distress for rent. This is what precipitated the application dated 24 September 2021 seeking orders to stop the sale of the goods. I gave an interim stay of sale of the goods subject to compliance with the orders of Olola J on deposit of part of the rent. When the application came up before me on 12 October 2021 the orders of Olola J had not been complied with and I vacated the interim orders of stay. The application was subsequently argued inter partes on 18 January 2022 and I reserved ruling for 2 March 2022. I however did not sit on that day as I was taken ill hence delivery of the ruling today.

4. Although there are two applications, the substantive application is that dated 8 September 2021 which seeks stay of execution pending appeal. The second application was only filed to stay sale of the applicant's goods and I think that its purpose is spent. Mr. Odhiambo, learned counsel, who appeared for the applicant at the inter partes hearing of the applications did not make any submissions and relied on the material filed. Mrs. N.A Ali, learned counsel for the respondents, on the other hand made written submissions which she relied on. I have

considered the same. What I need to determine is whether the applicant deserves a stay of the ruling of 26 August 2021 pending appeal.

5. The question of stay pending appeal is addressed in Order 42 Rule 6 (2) which provides as follows :-

(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

6. It will be noted that three elements need consideration. These are :-

(a) Whether the application has been made without unreasonable delay;

(b) Whether the applicant has demonstrated that he stands to suffer substantial loss unless stay is granted; and

(c) Security for the due performance of the order.

7. On the first issue, that of delay, I do not think the applicant is guilty of any delay as the application was filed on 8 September 2021 shortly after the ruling was delivered on 26 August 2021.

8. On substantial loss, I am persuaded that substantial loss may be suffered by the applicant. The applicant operates a bar and restaurant business in the premises and it is apparent that he has made a substantive investment in setting up the business. The only issue here is security. The 1st respondent made a pitch for rent arrears of Kshs. 5,349,159.40/= as at May 2021. I have seen the lease agreement which provides for a monthly rent of Kshs. 247,244/= for the period 1 November 2020 to 31 October 2021 and Kshs. 265,787/= per month for the period between 1 November 2021 and 31 October 2022. The applicant needs to deposit this amount of Kshs. 5,349,159.40/= and what may have accumulated from May 2021 to date. From June 2021 to October 2021, the accumulated rent should be Kshs. 1,236,220/=. From November 2021 to March 2022, the accumulated rent should be Kshs. 1,328,935. If you add up all these figures, the total is Kshs. 7,914,314.40/=. I am alive to the fact that in her suit, the plaintiff claimed that the 1st respondent was not entitled to claim the rent on allegations of breach of contract. That is a matter that can only be determined at trial. For the moment, it is imperative that the applicant gives security for any arrears of rent in the event that he loses his arguments on the legality of the distress. I am thus prepared to grant stay of the order of 26 August 2021 and stay any further distress of the goods of the applicant subject to the applicant depositing the amount of Kshs. 7,914,314.40/= in court within 14 days from the day hereof. If these monies are not deposited, then there will be no orders of stay of the ruling of 26 August 2021 and the applicant will have to prosecute the appeal without the benefit of any stay orders.

9. If the applicant abides by the conditions above, the costs of the application will be costs in the appeal. If the applicant does not abide by the above conditions, then the applicant will shoulder the costs of the two applications herein.

10. Orders accordingly.

DATED AND DELIVERED THIS 14TH DAY OF APRIL 2022.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA