



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 191 OF 2012

MEHMOOD TARIZ. 1ST APPELLANT

CAPITAL TRUCKS AND CARS LTD. 2ND APPELLANT

VERSUS

MOHAMMED SHEIKH HUSSEIN. RESPONDENT

R U L I N G

The application before the court is the Notice of Motion dated 2nd May 2012. It seeks mainly: -

That this court makes an order of immediate reinstatement of the 2nd Appellant/applicant to the occupation of the suit property known as L.R. No. 209/11902/16 City Park, or as described by the Respondent as L.R. Nairobi/Block 37/73, or howsoever described pending the hearing of and determination of this Appeal.

The application is based on an affidavit of support sworn by the Appellant and is moved on the grounds tabulated on the face of the application.

The facts behind the application to the extent the court understands them are as follows: -

The 1st Appellant is a Director of the 2nd Appellant which is a limited company. Since the year 2008, the 2nd Applicant/appellant has been a lawful tenant of a Third Party called Gerishon Kirima & Sons in the suit premises known as L.R. No. 209/11902, City Park, Nairobi. It has always dutifully paid the agreed rent throughout the relevant period. During the said period the applicant/appellant was allowed to put up a walled fence, a modern gate, an electric/Razor fence and a modern office block, around and inside the property. It also furnished the office with computers, printers, desks and chairs. Finally it also put up an ablution block, piped water, electricity supply, billboards, a kitchen and other necessary equipments for its business of selling, hiring out and washing cars. It cost the Appellant/applicant about Ksh.6,000,000/- to attain the said development and its business was good and flourishing.

On 24th February, 2012, however, in execution of the lower court decree in CMCC No. 624 of 2012, the Applicants/appellants were suddenly forcibly evicted from the abovementioned premises. The evicting personnel, who included Police Officers from Parklands Police Station, appear to have carried out their duties too enthusiastically. They demolished the Appellants abovementioned offices, the gate and electric fence, the ablution block and most of the other structures built by the Appellant.

What aggrieved the Appellants most is that they allegedly had not been served with the lower case

pleadings and related documents and did not know that a case had been filed and a decree dated 17th February, 2012 had been obtained, ex parte, against them. The situation appeared dire and the Appellant was logically driven to file an application dated 1st March 2012 before the lower court with a view to set aside the ex parte decree. It meanwhile had been disclosed to the applicant that although the ex parte decree had been obtained under CMCC No. 624 of 2012, a similar suit seeking similar reliefs had earlier been filed before the High Court as HC ELC No. 622 of 2011, under which the Respondent had failed to obtain the similar orders. And so to the Applicant, the new suit CMCC No. 624 of 2011 was filed deliberately so that the orders sought unsuccessfully under the High Court suit which was still pending, could deviously be obtained.

Feeling confident and properly armed with all the above knowledge and information, the applicant apparently argued its aforesaid application to set aside the ex parte judgment before the lower court. In the same application the applicant raised the issue of lack of jurisdiction of the lower court to hear and determine the suit since the proprietary value of the suit premises was over Ksh.50,000,000/-. The confidence did not however last long. That was so because the lower court went ahead to rule that it had jurisdiction to hear and determine the suit notwithstanding the large value of the subject matter. Then it also went ahead to appreciate that indeed, the orders and decree of the lower court were issued while the High Court suit No. 622 of 2011 existed, a situation which apparently invoked the principle of Res Sub Judice. Accordingly and for whatever purpose, the trial magistrate now decided to and actually stayed his case with an order of status quo, purportedly until the High Court suit is heard and determined.

The result of the stay of proceedings in CMCC 624 of 2012 pending the final determination produced a startling result! That is to say: -

- a. ***The application to set aside what the applicant believed was an ex parte decree for lack of service, became frozen and was left hanging since proceedings in that suit were stayed.***
- b. ***The Applicant had meanwhile been evicted and his vibrant business brought to a sudden halt but he could do nothing to change the situation as the lower court proceedings had been frozen by the stay of proceeding order.***
- c. ***All the applicants could find possible to do, was to file this appeal, and thereafter file this application seeking what appears to be a mandatory injunction.***

I have perused the application and the grounds supporting it. The applicant appeared totally uncertain of the reliefs it was seeking. The arguments it raised for this application appear to be in support of a possible setting aside of the alleged ex parte decree. On the other hand, the arguments also appear to be in support of the substantive appeal which is still pending and probably far off.

To start with the applicant brings this application under Order 42 Rule 6(6) which clearly allows this court's jurisdiction to grant temporary injunction on such terms as it thinks just. The application before the court, although not so expressly couched, clearly seeks a mandatory injunction against the Respondent who was the beneficiary of the decree that was executed to evict the Applicant. The Applicant did not explain to the court whether a mandatory injunction is similar to a temporary injunction or if the rules upon which the two are issued are the same. The Applicant did not either expressly state the party against whom the relief of mandatory injunction sought should be directed. It simply sought an or ***“order for immediate reinstatement of the 2nd Appellant/applicant occupation of the suit property....”*** Against whom?

Furthermore, the Applicants/Appellants, in an application for a mandatory injunction was under obligation to demonstrate a higher stand of proof of the grounds for granting such mandatory injunction. In this case the mandatory injunction is sought to compel an unnamed person probably the Respondent, to reinstate the Applicant into occupation of the premises known as L.R. No. 209/11092/16 also described as LR. No. Nairobi/Block 37/73, notwithstanding the existence of a dispute and uncertainly as to ownership of the property between the respondent and the applicants' landlords. Supposing the property indeed belongs to the Respondent and therefore the Applicant is a unsuper who was not entitled to let it to the

Applicant? Would such a case be suitable or proper for the granting of a mandatory injunction?

Finally and most important in this case, the eviction of the Applicants/Appellants from the premises on 24th February 2012 was not an act of stealing a match by the respondent against the Appellants. The fact is that the eviction was a proper execution of a court order properly issued by the lower court. The eviction was not in breach of any contract between the parties herein nor a tortious act by the Respondent as against the Appellants/Applicants. It was a lawful execution of a court order issued in whatever circumstances, by the court.

The court is aware that the execution and therefore, the eviction, may have caused heavy damage to the applicants who did not know that the execution was coming. However, that does not change the fact that the damage if any, was brought about in the execution of a lawful order of court. Furthermore, the fact that there are or may be good and sufficient grounds in the opinion of the applicant, for the setting aside of the lower court judgment, does not change the situation that the judgment and decree is valid until set aside. The same can be said of the pending appeal; until successfully prosecuted by the applicants in this application, the appeal does not in its present state, negatively affect the existing decree of the lower court whose execution is what brought about the damage complained.

The court notes that the Applicants were not in a position to apply for stay of execution pending the determination of this appeal. That is because execution by eviction had already been accomplished. That probably was the reason they decided to seek a mandatory injunction. The court has however, already stated that a mandatory injunction cannot be issued against a lawful order of execution of a decree and that the applicants did not demonstrate to this court how such an order would be issuable and be implemented.

In the above circumstances, this application seeking a mandatory injunction must fail. The only hope remaining for the Applicants is to prosecute their appeal without further delay. Meanwhile this application is hereby dismissed with costs reserved in the pending appeal.

Orders accordingly.

Dated and delivered at Nairobi this 25th day of June 2013.

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D A ONYANCHA

JUDGE