



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**

**CIVIL APPEAL NO. 132 OF 2013**

**PATRICK PAKIRO ODEKE T/A AIRPORT AFRICANA RESTAURANT .....**  
**APPELLANT**

**V E R S U S**

**KENYA AIRPORT AUTHORITY .....**  
**RESPONDENT**

**RULING**

1. The Appellant has filed this appeal against the ruling of 20th September 2013 in **CMCC Mbsa No. 1309 of 2013**. The Subordinate Court by that ruling made the following orders-
  - a. ***THAT the Notice of Motion dated 12<sup>th</sup> July 2013 is dismissed with costs to the Respondent.***
  - b. ***THAT both parties to agree on an independent valuer to determine the square feet of the new premises and agree on the rent payable within 14 days from the date hereof.***
  - c. ***THAT the Applicant to give possession of the suit premises for renovation within 21 days from the date hereof.***
  - d. ***THAT summons to issue to PATRICK PAKIRO ODEKE and BRYCESON NAMALE KUBOKA to show cause why legal action should not be taken against them for lying/giving false***
  - e. ***information under oath in a bid to mislead the Court.***
2. The Notice of Motion dated 12th July 2013 that was dismissed by the aforesaid ruling was for an order of injunction to restrain the Respondent from interfering with the Appellant's quiet occupation and running of the business at Moi International Airport Mombasa known as Africana

Restaurant.

### 3. **Background**

The Appellant has an existing license agreement with the Respondent by which the Respondent granted the Appellant a license to operate a Restaurant on the Airport grounds. That license agreement expires on 30th December 2013. It is dated 25th July 2011. The Respondent gave the Appellant notice that the Appellant's Restaurant business would be relocated to another location within the Moi International Airport. The basis of re-allocation of the Appellant's Restaurant according to the Respondent was that the structure where the Appellant was running its business was in need of repair. By a letter dated 8th July 2013 the Respondent in giving the Appellant notice to relocate his business stated therein “**please note that the integrity of the structure is not fit for human habitation.**” Following that notice the Appellant filed a suit in the Subordinate Court namely **CMCC Mbsa 1309 of 2013**. By that suit the Appellant sought a permanent injunction to restrain the Respondent from interfering with the running of his restaurant business. The Appellant's contention in that suit was that the Respondent had breached the license agreement by giving notice of relocation of the Appellant's restaurant. As stated before the Appellant filed an interlocutory injunction application dated 12th July 2013 before the Subordinate Court. That application was dismissed by the Subordinate's Court ruling dated 20th September 2013 which is the basis of this appeal.

4. Appellant has now before this Court filed a Notice of Motion dated 11th October 2013. By that application Appellant seeks a prayer of stay pending appeal of the order made on 20th September 2013. Appellant also seeks by that application an injunction pending appeal restraining the Respondent from relocating the restaurant business.
5. I will begin by considering the prayer for stay pending appeal. The only order in the ruling of 20th September 2013 to which stay pending appeal can be directed is the one which ordered **PATRICK PAKIRO ODEKE** and **BRYCESON NAMALE KUBOKA** to show cause why legal action should not be taken against them for lying/giving false information under oath. The learned Counsel for the Appellant argued that if stay was not granted the Appellant would suffer substantial loss. He submitted that to seek to have the Appellant show cause why legal action should not be taken against him is to deny him a fair hearing.
6. For the purpose of this ruling I need not look on the basis upon which the learned Magistrate made the order for the Appellant to show cause. That will be considered at the hearing of the appeal. The only considerations that I can direct my mind to in considering the application for stay are the ones set out in Order 42 rule 6(2) of the Civil Procedure Rules, 2010. That Rule provides-  
  
*“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.”*
7. The Appellant has preferred an appeal against the ruling of 20th September 2013. That being so and because to order an Appellant to show cause before the Subordinate Court may lead to further orders being made before the appeal is determined I do find that the Appellant may indeed suffer substantial loss. The loss contemplated under Order 42 Rule 6(2) does not necessarily have to be monetary loss. The loss of liberty if indeed the Subordinate Court was to find the Appellant was in contempt of Court would in my view qualify as a substantial loss.
8. In my view, the Court has discretion whether or not to order security to be provided for the due performance of the decree or order. In this case, the order for the notice to show cause by the

Appellant would not in my view require security to be provided.

9. In the end, the Court will grant stay of execution of the order that required the Appellant to show cause before the Subordinate Court pending the hearing and determination of this appeal.
10. Appellant in order to succeed in his prayer for injunction to issue pending appeal as provided under Order 42 Rule 6(6) has to satisfy the principles of granting an injunction as set out in the case of **GIELLA -VS- CASSMAN BROWN & CO. LTD [1973] E.A 358**. Under that Rule 6(6) the Court has power to grant an injunction in exercise of its Appellant jurisdiction.
11. The first principle of granting an injunction is that the Applicant must show a prima facie case with probability of success. To consider if the Appellant has shown a prima facie case one has to consider the documents which regulated the relationship between the Appellant and the Respondent. That is to say one has to consider the license agreement. Under that agreement and in particular Clause 10(h) the Respondent reserved for itself discretion to re-locate the Appellant's business. That discretion is even more pronounced under Clause 15 which provides as follows –

**“RELOCATION**

***The licensor reserves the right to relocate the licensee to other space within the airport. In case of relocation the licensor may at all times and as far as is possible grant the licensee a space that is equal in size to the prior space provided always that if there is a difference in size or in prominence of the new space, then the license fees shall be adjusted by the licensor in accordance with the difference in size between the prior space and one the licensee is to be relocated to.”***

What the Respondent sought to do by giving the Notice to the Appellant was to relocate the Appellant's restaurant business and not to evict the Appellant.

12. It is also important to note that the Magistrate whose order is the subject of this appeal before issuing her orders visited the Appellant's restaurant. It is pertinent to consider what she observed on making that visit of the scene. She stated as follows-

***“...The Court visited the site on 20<sup>th</sup> August, 2013. The building just from the outside is in a wanting state. The structure is clearly dilapidated, an eye sore, the outside toilets are in a very poor state and the makuti roof is full of gaping holes! One wonders what happens when it rains. Some of the wooden beams are broken and in dire need of repair. In brief, the Court formed the opinion that the structure is a public hazard and needs to be pulled down or very serious renovations carried out i.e. a total overhaul!....”***

***....Court having ascertained that the premises are in a very poor state owes the public a duty of care. The renovations that would be carried out would be extensive. ... The Court cannot close its eyes on a looming disaster for God forbid if the roof and the wooden beams were to collapse on members of the public. If the toilet walls were to fall and if the kitchen/store walls which looked dilapidated were to collapse on the staff! There is no way the consequences would be reversible but loss of profit is reversible in damages....”***

13. Even the Appellant by his letter dated 22nd May 2013 was of the view that the renovations required to be carried out on the premises were major and he estimated they would cost Kshs. 1.6 million.
14. As shown before the Respondent reserved its right to re-locate the Appellant's business. That is a clear term of the parties contract. A party cannot run away from the terms of its agreement. It has often been stated that the Court's functions are to enforce contracts that the parties enter into. The court cannot rewrite the parties agreements. In that regard see the case **SHAH -VS- GUILDERS INTERNATIONAL BANK LTD [2003]KLR** where the Court in considering the terms of the

parties contract stated-

***“The parties executed the same willingly and they are therefore bound by it.”***

15. In my view on a prima facie basis the parties contract provided that the Respondent at its discretion could relocate the Appellant's restaurant and in so doing, would re-evaluate the rents due according to the new space allocated to the Appellant. It is because I have made that finding that I find the Appellant has failed to show a prima facie case with probability of success.
16. On the second principle of granting an injunction I find that the Appellant's loss of business if any can be compensated by an award of damages. Such loss can be quantified accordingly I find that the Appellant has not shown that he will suffer irreparable loss.
17. Because I do not entertain any doubt in respect of the first and second principles of granting an injunction I shall not proceed to consider the third principle that is balance of convenience.
18. In the end, the orders that commend themselves to me are as follows-
  - a. **An order of stay of execution of the order issued on 20th September 2013 in CMCC Mbsa 1309 of 2013 which order required PATRICK PAKIRO ODEKE and BRYCESON NAMALE KUBOKA to show cause is hereby granted pending the hearing and determination of this appeal.**
  - b. **The prayer for injunction pending appeal sought in the Notice of Motion dated 11th October 2013 is dismissed with costs to the Respondent.**

Orders accordingly.

**Dated and delivered at Mombasa this 11<sup>th</sup> day of December, 2013.**

**MARY KASANGO**

**JUDGE**