REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

Civil Appeal 11 of 2009

JANE NJOKI MUKABI……..APPELLANT

-AND-

1. THAMMO HOLDINGS LTD

2. NAIROBI HOMES (MSA) LTD …….……..RESPONDENTS

(Being an appeal from the Ruling and Order of Senior Principal Magistrate

Ms. L. Mutende delivered on 26th January, 2009 in Civil Case No.1945 of 2008

at Mombasa Law Courts)

JUDGMENT

M/s. J.O. Magolo & Co. Advocates, acting for the plaintiff, had moved the Court under certificate of urgency, by the Chamber Summons of ***15th October, 2008,*** with the following prayers:

*(i) THAT the Court be pleased to review its Orders made on **9th October, 2008** discharging the temporary injunction recorded by consent of the parties on **27th August, 2008**;*

*(ii) THAT an Order be made directing that the status quo as at **13th October, 2008** be maintained pending the determination of this application.*

The instant appeal is in respect of the learned Senior Principal Magistrate's brief Ruling which, for the material part, thus reads:

*"The application [of **15th October, 2008**] was opposed by the respondent's counsel who argued that it was the third time the plaintiff sought to obtain an ex parte injunction contrary to the provision of Order XXXIX, Rule 3(2) [of the Civil Procedure Rules]; [and further], that the status quo was another disguised injunction which in fact was an abuse of Court process.*

*"Submissions by counsel have been considered. I have perused the Court record. There was no injunction Order recorded by consent on **27th August, 2008** as alleged in the application. The Court declined to reinstate the Order of injunction at the time of reinstating the application. No reason was given but I believe the Honourable Magistrate must have had the provisions of Order XXXIX, Rule 3(2) in mind. An ex parte injunction is only supposed to be extended once, yet this is indeed the third time the applicant is seeking its extension. I have found no good reason why I should review the Order made.*

"It is alleged there is a threat of eviction. I have also perused the copy of the lease annexed. The Court has absolutely no reason to intervene. I therefore decline to grant the Orders sought.

"The application by the [plaintiff] is hence dismissed with costs to the respondents."

Being dissatisfied with the Court's Ruling, the plaintiff lodged the instant appeal, asserting as follows:

(i) the learned Senior Principal Magistrate erred in law and fact, in dismissing the application;

(ii) the learned Senior Principal Magistrate erred in law and fact, in failing to note that in failing to maintain the status quo while a suit is pending with regard to the same premises, the Court effectively rendered the suit nugatory;

(iii) the learned Senior Principal Magistrate erred in law and fact in failing to follow the applicant's argument with regard to the suit premises, and in dismissing the appellant's arguments without consideration;

(iv) the learned Senior Principal Magistrate erred in law and fact in failing to note that the question as to whether a tenancy relationship existed between the respondent and the applicant, was a matter to be determined by duly-evaluated evidence.

Learned counsel, ***Mr. Magolo*** entered upon his submissions by stating that the Chief Magistrate's Court Civil Case No. 1945 of 2008, in which the appellant is the plaintiff, and the respondent the defendant, was still pending, and neither party has been heard, as yet.

Counsel submitted that the appellant had filed the suit with an application seeking temporary relief; hearing of the application did not take place as scheduled on ***27th August, 2008*** and ***10th September, 2008;*** it was adjourned to ***29th September, 2008*** but the appellant's counsel was not in Court when the matter was called out: and the application was dismissed. The effect of the dismissal was that the interim Order of injunction lapsed. The appellant then made an application seeking to set aside the Order of dismissal, and also to have new Orders for injunctive relief. Although this application was later allowed, the learned Magistrate declined to issue an Order of injunction; and so the appellant's claimed interest in the suit property, was left with no protection. When the appellant moved the Court to review its earlier Orders, the application was dismissed – and this led to the instant appeal.

Counsel submitted that the Court, in agreeing to have an application for injunction argued but at the same time declining to issue an Order maintaining the ***status quo***, had abdicated its responsibility to preserve the *status quo* pending the hearing and determination of the matter.

Counsel submitted, from the evidence, that the appellant was and still is a tenant on the suit premises owned by 1st respondent, and 2nd respondent is the managing agent. Although the term of the plaintiff's lease has expired, she had been promised renewal, or grant of a new lease, both orally and in writing (letter of ***20th April, 2004).***

Counsel submitted that the respondents have threatened the appellant's interest in the lease, by demanding vacant possession (letter of ***24th July, 2008).***

Counsel urged that the appellant is aggrieved by the refusal to review the Court's earlier Orders,

and by the refusal to sustain the *status quo* through an appropriate injunctive Order.

To fortify the appellant's case, in terms of the relationship between the parties in the discharge of accrued obligations, counsel submitted that "*rent or mesne profits were agreed to be paid and are being paid";* and consequently, it was urged, "*the respondent suffers no prejudice."*

Learned counsel urged that "*the facts presented before the Court showed a clear intention to interfere with the suit property*." Counsel urged that "*this Court is well placed to correct [the situation] and ensure that the status quo is preserved so that both parties… can pursue the claims."*

Learned counsel, ***Mr. Ndegwa*** focused his submissions not on the interlocutory question, but on the construction of the tenancy agreement – thus, on the fundamental questions of rights which the plaintiff seeks to settle through *prosecution of the main cause*. Counsel urged that the appellant was "*seeking [to] defeat the terms of the written lease", "by a multiplicity of frivolous applications and ex parte Orders."*

Although ***Mr. Ndegwa***, contrary to the contention of ***Mr. Magolo***, states that the appellant is "refusing to pay *mesne profits*", these contrasting statements affirm one thing: both parties recognize *mesne profits* to be, indeed, *payable* by the appellant.

Mr. Ndegwa has argued the respondent's case at length, relying on several authorities, including: ***Uhuru Highway Development Limited v. Central Bank of Kenya & Two Others,*** Civil Appeal No.36 of 1996 [1996] eKLR; ***Omega Enterprises (Kenya) Ltd v. Kenya Tourist Development Corporation and Others*** [1993] LLR 2525 (CAK); ***CMC Motors Group Ltd & Another v. Evans Kageche Boro***, Civil Appeal No. 295 of 2001 [2006] eKLR; ***Kenya Breweries Limited & Another v. Washington O. Okeyo,*** Civil Appeal No. 332 of 2000.

I have noted certain particular passages in the foregoing authorities which have been relied on; in the ***Kenya Breweries Limited Case***, the passage is this:

"It is trite that a contracting party who fails to perform his part of the contract cannot obtain an injunction to restrain a breach of covenant by the other party."

In the ***CMC Motors Group Ltd Case,*** the relevant passage is:

"In law the terms of a contract which has been reduced to the form of a document can only be proved by the document itself…and once the terms of the contract have been ascertained from the document no evidence of any oral agreement for purposes [of] contradicting, varying or subtracting from its terms, is admissible…"

The focus of the judicial statements thus relied upon, is concerned with fundamental arguments of law, which go into the determination of *proprietary rights*, ultimately. That, however, is not the context in which the appellant's case rests. The appellant, at the fundamental level, has a ***suit,*** that makes claims on issues of *tenancy*. That suit is *yet* to be heard and determined; and it is his prayer that the Court may sustain the process of hearing his suit.

The respondent's case-authorities, in my opinion, have not been lodged in the proper cause. It is not the *core contractual rights* being contested at this point – they, of course, will be properly contested, in the *main suit*. The main suit, therefore, is the medium for the resolution of the competing claims: and this Court has an obligation to sustain the basis for hearing and determining that suit.

The plaintiff's applications, and her appeal, quite clearly, call upon the Court to avert the risk of the main cause being rendered *nugatory*. Whenever such a case is made before this Court, the odds are in favour of the same being granted – firstly because the prayer is a genuine one which goes to the cause of justice; but secondly, and equally important, the Court's constitutional mandate requires it not to make decisions *in vain*; so important are the Court's decisions, in the setting of claims of justice, the Court must protect the *status quo* to remain adapted to the ultimate binding decree.

Upon considering the facts of the instant case, I have come to the conclusion that the learned Principal Magistrate was in error, in not making Orders that would *sustain the context for binding decisions* taken after hearing the merits of the case.

I will, therefore, allow the appeal herein, and make specific Orders as follows:

(a)*I hereby set aside the Senior Principal Magistrate's Ruling and Orders of *26th January, 2009.

(b)The appellant's suit in Civil Case No. 1945 of 2008 shall be listed at the Chief Magistrate's Court for mention and directions for hearing on the basis of priority.

(c) Pending the hearing and determination of Civil Case No.1945 of 2008 the *status quo* in the possession and occupation of the suit property shall be maintained.

(d)Accrued rents/*mesne profits* on the suit property shall be paid as agreed between the parties and, failing agreement, parties have the liberty to apply.

(e) The costs of this application shall be borne by the respondents.

Decree accordingly.

SIGNED at **NAIROBI** …….

J.B. OJWANG
JUDGE

DATED and **DELIVERED** at **MOMBASA** this 13th day of February, 2012.

MAUREEN ODERO
JUDGE