



REPUBLIC OF KENYA



KENYA LAW
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Dixons Electronics Limited v United Housing Estate Limited (Environment and Land Appeal E045 of 2021) [2022] KEELC 2312 (KLR) (30 June 2022) (Ruling)

Neutral citation: [2022] KEELC 2312 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E045 OF 2021**

**MD MWANGI, J
JUNE 30, 2022**

BETWEEN

DIXONS ELECTRONICS LIMITED APPLICANT

AND

UNITED HOUSING ESTATE LIMITED RESPONDENT

(In respect of the Notice of Motion Application dated 25th February, 2022 seeking an order of temporary injunction pending the hearing and determination of the appeal)

RULING

Background

1. Before this court is the Appellant's application dated the February 25, 2022 filed under the provisions of Sections 1A, 1B, 3A and 63 of the *Civil Procedure Act*, Order 42 and Rule 6 (6) of the *Civil Procedure Rules* and all the enabling provisions of the law.
2. The Appellant prays for an order of temporary injunction pending the hearing and determination of the appeal filed herein restraining the Respondent either by itself, its servants and/or agents, employees, advocates or auctioneers or any of them from or otherwise from attaching, selling by public auction or private treaty, advertising for sale, disposing of or otherwise howsoever or completing any transfer or any sale, parting with possession except to the Appellant or otherwise howsoever interfering with any of the Appellant's property or acting in any detrimental way to the Appellant. The Appellant also prays for costs of the application.
3. The application is premised on the grounds on the face of it and the Supporting Affidavit of Muktar Parker deposed on the 25th February, 2022. The deponent who is a director of the Appellant avers that the Honorable M.W. Murage, SRM, in the Milimani Commercial Court CMCC E7420 of 2020 issued a Ruling dismissing the Appellant's Notice of Motion application dated the December 11, 2020. That



being aggrieved by the said decision, the Appellant has lodged an appeal in this Court as evidenced by the Memorandum of Appeal filed herein.

4. The deponent further restates the grounds of appeal raised in the Memorandum of Appeal among them being that the Learned Magistrate erred in law and in fact in failing to appreciate that the monthly rental payment of Kshs. 300,000/= was inclusive of VAT. The deponent avers that the Learned Magistrate erred in failing to appreciate that in any event the VAT applicable on rent does not constitute rent for which distress for rent may be levied. That the Learned Magistrate failed to interpret the provisions of Clause 3.1 of the Lease correctly thereby arriving at a wrong decision. Further that the Learned Magistrate failed to consider the Appellant's Supplementary Affidavit in which the Appellant had demonstrated that the disputed rent, exclusive of VAT was paid in full.
5. The Appellant averred that after the dismissal of their application by the Magistrate's Court, parties tried to negotiate but the Respondent has turned around and issued a notice for forfeiture making unjustifiable demands for rent. It urges this court to intervene otherwise the Respondent shall proceed to levy distress illegally against it. The Appellant states that its intended appeal is clearly arguable, with high prospects of success and the intended eviction shall negate the appeal.

Reply by the Respondent

6. The Application is opposed by the Respondent by way of the replying affidavit sworn by Zahid Nanji, deposed on the March 17, 2022. The Respondent avers that vide the Agreement for renewal of the Lease executed by the parties herein on the February 4, 2019, the rent payable was 300,000/=. The deponent further deposes that it was mutually agreed by the parties that the Appellant would pay by way of additional rent a proportionate amount of the annual rates for the rental premises. The Appellant was also supposed to proportionately pay land rent, and other taxes or outgoings chargeable on the premises. The rent payable, according to the Respondent was exclusive of VAT.
7. The Respondent affirmed that the Appellant has failed to settle rent in arrears and additional rent amounting to Kshs. 3,797,268/= prompting the Respondent to levy distress for rent to recover what is due to it. The Respondent states that the Appellant had at the Magistrate's Court initially alleged that it had made an overpayment only for it to acknowledge rent arrears of Kshs. 1,466,580/- at a later stage.
8. The Respondent therefore contends that the Appellant is not forthright and is therefore not entitled to the equitable remedy of an injunction. The Respondent denies the Appellant's allegations that there were any attempts towards an amicable settlement of the dispute.
9. It is the Respondent's contention that at the time of filing this appeal, the Appellant was in rent arrears of Kshs. 6,242,180/=. The Respondent further accused the Appellant of issuing post-dated cheques which were dishonoured by the Respondent's Bank.
10. The Respondent urges the Court to disallow the Appellant's application since it would cause it financial hardship while the Appellant continues benefitting by carrying out business on the demised premises without paying rent.

Rejoinder by the Appellant

11. The Appellant filed a further affidavit deposed by Muktar Parker sworn on the April 12, 2022 in response to the Replying Affidavit by the Respondent. The deponent states that distress for rent is a remedy available to the Landlord strictly for recovery of rent arrears. The remedy does not extend to the recovery of rates, ground rent, or any other related outgoings as the Respondent has attempted to do in this case.



12. Further, that the Appellant has been and is willing and ready to pay the rent in accordance with the Lease Agreement between the parties without the unlawful VAT, rates and ground rent charges that the Respondent is claiming. That it is clear from the Respondent's statement of Account that the Respondent is seeking to levy distress for amounts other than rent arrears contrary to *Distress for Rent Act*.
13. According to the Appellant, all the dishonored cheques it had issued were replaced and cleared. The amount owing is only Kshs. 1,997,920/= which it is willing and ready to pay. The Respondent's claim including the disputed VAT is made without any invoices. Consequently, the notice of forfeiture issued by the Respondent is illegal for the foregoing reasons.

Court's Directions

14. 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

15. In the court's opinion, and considering the Appellant's application, the response by the Respondent and the submissions filed, the issues for determination in this matter are:
 - (a) Whether an order of temporary injunction may be granted pending appeal.
 - (b) Whether the Appellant/Applicant has satisfied the test for the grant of an order of temporary injunction pending appeal.
 - (c) Who shall bear the costs of the Application?

Analysis and Determination

A. Whether an order of temporary injunction may be granted pending appeal.

16. Order 42 Rule 6 of the Civil Procedure Rules provides as follows:

“(6) notwithstanding anything contained in sub rule (1) of this rule, the High Court (and Courts of equal status) 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.” (Emphasis mine)

17. This Court, in the case of *Umar Auto Garage New & another v Githere Investments Limited* [2022] eKLR stated that;

“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.....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.”

18. The Court's finding on the first issue is that a temporary injunction may be issued pending the hearing and determination of an appeal where the Appellant has complied with the process of instituting an appeal under the provisions of order 42 rule 1 of the Civil Procedure Rules.



B. Whether the Appellant/Applicant has satisfied the test for the grant of an order of temporary injunction pending appeal.

19. The Appellant having filed a memorandum of appeal in accordance with the provisions of order 42, is deemed to have complied with the procedure for instituting an appeal (from a subordinate court or a tribunal) to this court. Therefore, an order of temporary injunction may be granted if the Appellant/Applicant's application meets the threshold for the grant of a temporary injunction pending appeal.
20. In the case of *Patricia Njeri & 3 others vs National Museum of Kenya* [2004] eKLR, cited in the case of *Umar Auto Garage New & another v Githere Investments Limited (Supra)*, Justice Visram J (as he then was) spelt out the principles to be followed in considering an application for a temporary 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.
21. 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.
22. The basis of the relationship between the Appellant and the Respondent herein is the Agreement for renewal of the Lease executed by parties on the 4th February, 2019. Whereas it is not in dispute that the rent payable is Kshs. 300,000/=, parties disagree on whether this amount is inclusive of VAT or not. The Appellant contends that amount claimed by the Respondent is inclusive of VAT, ground rent and rates. Therefore, the Appellant/Applicant argues that the intended 'distress for rent' is illegal as it goes beyond the claim for rent.
23. Section 3 of the *Distress for Rent Act* provides that: -
- “Subject to the provisions of this Act and any other written law, any person having any rent or rent service in arrears and due upon a grant, lease, demise or contract shall have the same remedy by distress for the recovery of that rent or rent service as is given by the Common Law of England in a similar case.
24. The Court of Appeal in the case of *C.Y.O Owayo v George Hannington Zephania Aduda t/a Aduda Auctioneers & another* [2007] eKLR stated that:
- “We must not only consider our laws, but must also consider what in England would be considered an illegality in the levy of distress. In *Halsbury's Laws of England, 4th Edition Volume 13* paragraph 368 it is stated:
- “368. Circumstance in which distress is illegal. An illegal distress is one which is wrongful at the very outset, that is to say either where there was no right to distrain or where a wrongful act was committed at the beginning of the levy invalidating all subsequent proceedings.



The following are instances of illegal distress; a distress by a landlord after he has parted with his reversion; a distress by a person in whom the reversion is not vested; a distress when no rent is in arrear; or for a claim or debt which is not rent; as a payment for the hire of chartels; a distress made after a valid tender of rent has been made; a second distress for the same rent; a distress off the premises or on the highway; a distress in the night that is between sunset and sunrise a distress levied or proceeded with contrary to the law of Distress.....”

25. The issue that arises then is whether the intended levy of distress for rent by the Respondent is illegal or not. This can only be finally determined after hearing the appeal.
26. At this temporary stage, the court is not required to make any conclusive or definitive findings of fact or law as has been stated severally. The court too must exercise caution in order not to hurt or embarrass the hearing of the main appeal.
27. I will therefore be frugal with my words in this ruling. On the face of it, the Appellant’s appeal cannot be said to be frivolous. It raises serious legal and factual issues that should be determined after the main appeal is heard.
28. Guided therefore by the above cited authorities, I am convinced that the Appellant in this case is deserving of the order of a temporary injunction pending the hearing and determination of the appeal.
29. The Respondent contends that it will suffer prejudice if the Appellant is granted the orders sought since the Appellant will continue to carry on its business on the demised property without paying rent.
30. Justice is a two way street. The Respondent is equally entitled to the protection of the law as much as the Appellant. This court will therefore not just turn a deaf ear to the Respondent’s concerns. The court shall issue conditions in order to ‘mitigate’ the loss to the Respondent pending the hearing and determination of the appeal and expedite the hearing of the appeal.
31. The existence of the tenancy relationship between the two parties is not in dispute. The Appellant, who is the tenant has expressed willingness to pay the undisputed amount of Kshs. 1,997,920/=.
32. The Court will therefore conditionally allow the Appellant’s application. The Appellant shall pay the undisputed sum of Kshs. 1,997,920/= within 14 days of the date hereof. Thereafter, the Appellant shall continue to pay the undisputed monthly rent on the due date (according to the terms and conditions of the agreement) without fail pending the hearing and determination of the appeal. Further, the Appellant shall file its record of appeal in the next 60 days from the date of this ruling in order to expedite the hearing of the appeal. The costs of the Application shall be in the cause.
33. The upshot is that the Appellant’s application is allowed in the following terms:
 - a) An order of temporary injunction be and is hereby issued restraining the Respondent either by itself, its servants and/or agents, employees, advocates or auctioneers or any of them from or otherwise from attaching, selling by public auction or private treaty, advertising for sale, disposing of or otherwise howsoever or completing any transfer or any sale, parting with possession except to the Appellant or otherwise howsoever interfering with any of the Appellant’s property or acting in any detrimental way to the Appellant pending the hearing and determination of the appeal herein.
 - b) The Appellant shall pay to the Respondent the sum of Kshs. 1,997,920/= within 14 days from the date hereof.



- c) The Appellant shall file its Record of Appeal within the next sixty (60) days from the date of this ruling.
- d) That failure to comply with the orders in (b) and (c) above, the order granted herein shall lapse.
- e) The Appellant shall continue to pay the undisputed monthly rent to the Respondent on the due date, in accordance with their lease agreement without fail.
- f) The costs of this application shall be in the cause.

It is so ordered

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JUNE 2022

M.D MWANGI

JUDGE

In the Virtual Presence of: -

Ms. Migiro for the Appellant

Mr. Janjo h/b for Mr. Shah the Respondent

Court Assistant: Hilda

M.D. MWANGI

JUDGE

