



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 617 of 2011

Editorial Summary

1. *Civil Appeal*
2. *Civil Practice & Procedure*
3. *Subject of Subordinate Court case*
 - 3.1 *Distress of rent*
 - 3.2 *Issue of landlord/tenant questioned.*
 - 3.3 *Injunction against respondent original defendant
from levying distress of rent.*
4. *Application dated Notice of Motion 2nd March 2012*

Stay of Execution

- 4.1 *Hon. Trial magistrate ruled that there being
arrears of rent distress of rent may be levied.*
 - 4.2 *Ruling of 24th November 2011 breaking
orders do issue within 10 days.*
 - 4.3 *Application for stay of execution by Ruling
of 28th February 2012 granted subject to
Ksh. 1,140,000/=*
 - 4.4 *Security ordered high as distress was for
Ksh. 490,000/-*
5. *In reply as per affidavit*

5.1 *Alleged appellant vexatious litigant.*

5.2 *Condition imposed for*

stay

6. *Findings*

6.1 *stay of execution granted.*

7. *Case Law:*

a) *Mukuma – Vs – Abuoga*

(1988) KLR 645

(Platt, Gachuhi, Maseme

JJA)

b) *National Bank of Kenya*
Vs

Barrack Deya Okul

HCCC 35/1994 (Nakuru)

(Musinga J)

c) *Kenya Alliance Insurance Co. Ltd*
vs

John Mutuku Musyimi

CA 473/04

(Visram J)

8. *Advocates :*

i) *F.S. Macharia instructed by M/s Mungai Kalande & Co Advocates for
appellant/applicant*

ii) *Walubengo instructed by Walubengo Waningilo & Co Advocates for
respondent/respondent*

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CIVIL APPEAL NO. 617 OF 2011

SAMSON NGUGI ICHUNGA APPELLANT/

TENANT

VERSUS

JOSEPH D. KIMANI T/A

PRAMID AUCTIONEERS 1ST RESPONDENT

RAJU DHANANI2ND RESPONDENT/

LANDLORD

(Being an appeal from the Ruling of Hon. C. Obulutsa Senior Principal Magistrate in Misc.Civil Case No. 536 of 2011 dated 29th November 2011 at

Milimani Commercial Courts)

R U L I N G

Application for Stay of Execution

Dated 2nd March 2012

I. INTRODUCTION

1. There has been multiplicity of suits filed in the High Court and in the subordinate courts concerning the two parties herein, namely the appellant/applicant, Samson Ngugi Ichungwa and the respondent/respondent, Raju Dhanani.

2. The issue that arises is that of the ownership of land parcel known as Kikuyu/Kikuyu Block1/48 and Kikuyu/Kikuyu Block 1/55 in which both claim lawful ownership.

3. The applicant alleged that the issue of ownership of land is being dealt with in HCCC 86/11. This dispute is yet to be heard and determined. The respondent on the other hand claims the application is a vexatious litigant having filed various cases before, being HCCC 592/08,

HCCC 287/09 and HCCC 86/11.

4. The respondent holds title to the property (which is challenged by the applicant). He filed through the auctioneers HCCC Misc 443/11 for orders of eviction inter alia of the applicant. These orders were dismissed by the High Court on 5th May 2011. He then filed

Misc Application 536/11 in the subordinate courts at Milimani seeking levy of distress for rent.

5. The applicant opposed this on grounds that he was never a tenant and the issue of levy of distress did not arise. The Hon. Magistrate dismissed the application by its ruling of 24th November 2011 that had been brought by the applicant seeking to set aside the exparte orders obtained by the respondent.

6. By a further application to the same court seeking orders for stay of execution, the Hon. Magistrate granted orders for stay of examination on condition that a sum of Ksh. 1,140,000/- be deposited to court within 7 days.

7. The applicant filed appeal to this High Court and sought orders of stay of execution of the Hon. Magistrates.

II APPLICATION FOR STAY OF EXECUTION

8. The applicant stated that the Hon. Magistrate had ordered an inordinate high security of Ksh. 1,140,000/- to be deposited in court when only a sum of Ksh. 490,000/- was alleged to have been in dispute. There was no tenancy that existed.
9. A period of ten days had been given to comply with the said orders.
10. The respondent filed a reply to the said application but both his advocate and him failed to attend court despite being aware of being notified of the same.
11. It was therefore stated in the affidavit that the sum of Ksh. 1,140,000/- as security was reasonable. That this should not be interfered with.

III FINDINGS

12. The issues that arises from the various suits filed in both the High Court and subordinate courts require to be looked into. It is as a result of these various suits that the issue of orders granted in the magistrate's court was so done within the law? This may be part of the main appeal yet to be heard.
13. What is of essence is the question as to whether this court should stay the orders of the Hon. Magistrate ordering the deposit of Ksh. 1,140,000/- as security for alleged distress of rent being in arrears?"
14. In the case law referred to by the applicant of

Mukuma – Vs – Abuoga

(1988) KLR 645

(Platt, Gachuhi & Masine JJA)

It was held that in exercising one's right of appeal

“The court ought to see that the appeal is not rendered nugatory by preserving the status until the appeal is heard.” That “the question to be decided is whether substantial loss may result unless stay is granted, whether the application was made without delay and whether security had been offered.”

15. In this present application substantial loss would be occasioned upon the applicant if the decision of earlier suits filed is determined in his favour. The issue of Section 6 of the Civil Procedure Act required to be considered by the Hon. Magistrate in dealing with multiplicity of cases before and or not before its court.
16. The application herein was made to the Hon. Magistrate first and without delay and thereafter to this court.
17. The applicant stated that the security ordered by the court to be paid was inordinately high. This court upon the application before it would grant the prayers of stay of execution till the determination of the appeal. It would order that security of costs of Ksh. 150,000/- be deposited to court, alternately a bankers guarantee of the like sum to be so paid within 90 days.
18. There will be costs to the applicant/appellant on this application.

DATED THIS 7th DAY OF JUNE 2012 AT NAIROBI

M.A. ANG'AWA
JUDGE

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Advocates :

- i) *F.S. Macharia instructed by M/s Mungai Kalande & Co Advocates for
appellant/applicant*

- ii) *Walubengo instructed by Walubengo Waningilo & Co Advocates for
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