



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT EMBU**

**Civil Appeal 59 of 2012**

**KUDGETA  
WAMUGO NJIGORU  
&**

**5 OTHERS..... APPELLANTS**

**VERSUS**

**FREDRICK MUKUA NJIGORU & ANOTHER..... RESPONDENTS**

***(Being an appeal from the Ruling of M. WACHIRA Chief Magistrate Embu in CMCC No. 53 of 2012 delivered on 19<sup>th</sup> April, 2012)***

**R U L I N G**

This is the application (Chamber Summons) dated 27/4/2012 brought under Order 40 Rule 1 & 2 Order 42 Rule 1 & 6 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act for the following orders;

- 1. Stay of the Ruling delivered on 19/4/2012 by the Chief magistrate pending the hearing and determination of the appeal filed on 20/4/2012.***
- 2. Temporary injunction restraining defendants etc from attaching, removing equipment, or interfering in any way with the plaintiffs, shops or businesses and or schools in NJIGORU BUILDING PLOT NO. EMBU TOWNSHIP PLOT NO. 330 pending the hearing and determination of this suit.***

The application is based on the grounds in the body of the application. The gist of which is that the Applicant has filed an appeal which maybe defeated bid the attachment of the Appellants properties is stayed.

It is also supported by the affidavit of the 1<sup>st</sup> Appellant herein. She indicates that the attachments of the Appellants properties which include a college, shops and other businesses will be affected adversely if the orders sought are not granted.

The 1<sup>st</sup> Respondent filed a replying affidavit opposing the application. He states that there is a similar application before the Chief Magistrate coming for hearing on 22/5/2012. And that when they appeared before that court on 26/4/2012 the Appellants/Applicants did not apply for any orders of stay. The Applicants would not suffer any irreparable loss if the distress for rent was levied. The 2<sup>nd</sup> Respondent also filed a replying affidavit raising same issues as those raised by the 1<sup>st</sup> Respondent.

Both counsels made oral submissions reiterating what had been deponed to by the parties herein. The Ruling giving rise to this application was delivered by the Hon. Chief Magistrate on 19/4/2012. The applicants were aggrieved by that ruling and have filed an appeal against it. The Ruling was to the effect that their application for injunctive orders was dismissed with costs.

It is this order that they want stayed and at the same time the Respondents to be enjoined from levying distress against them. What the 1<sup>st</sup> Appellant is saying is that she is the owner of the Building on **Plot 330 Embu** where the 2<sup>nd</sup> to 6<sup>th</sup> Appellants are tenants. And that she was paid the rents due from these tenants. Therefore it would not be fair for the innocent tenants to be subjected to double payment because of the demands by the 1<sup>st</sup> Respondent.

There is no dispute that there is an order emanating from the Court of Appeal at Nyeri in Civil Application No. NAI 337/2009 (UR 232/2009). The order is very clear that the 1<sup>st</sup> Respondent was to continue managing Plot No. 330 Embu Township and receiving rent. This order was made on 2/12/2011 and issued on 16/1/2012. The parties herein were served on 18/2/2012. It is not shown when the 1<sup>st</sup> Appellant/Applicant was served with the order but should be around the same time. The order does not show that at the time of delivery of the Ruling the 1<sup>st</sup> Appellant who was the Respondent was present. And if the orders were served on the tenants on 18/1/2012 is there any one of them who paid rent to the 1<sup>st</sup> Appellant after that date ? Once this is ascertained, then the Court would go further to determine if there was disobedience of the Court of appeal Order hence the coming to Court with unclean hands, by the Appellants/Applicants. For example those who had paid rent up to May 12, should pay the next amount of rent to the new management or quit.

I would not wish to delve into the merits and demerits of the Appeal but I would say the Applicants have an arguable appeal there is a similar application pending before the Chief Magistrate which had been fixed for hearing on 22/5/2012. And the question is what would have been happening in the interim without any safe guard for the Appellants/Applicants? There is an appeal lodged herein and there is nothing under Order 42 Rule 6(1) - (6) of the Civil Procedure Rules barring this court from hearing such an application.

The 1<sup>st</sup> Respondent has raised an issue of fake receipts having been used by the appellants to cover their operations. This issue should have been raised before the lower court and if it was it will be dealt with during the Appeal. And I would wish to mention that after service of the orders from the Court of Appeal, counsels appearing for the 1<sup>st</sup> Appellants and 1<sup>st</sup> Respondent should have called parties for a meeting to explain the import of those orders, and even have a handing over of the accounts etc. it appears nothing of this sort happened leaving the tenants confused. With this scenario I do find that the Tenants need to be protected by this Court.

In the cases of

1. **FRANCIS KABAA VS NANCY WAMBUI & ANOTHER CIVIL APPEAL NO. NAI 298/1996 (UR)**
2. **BAVARIA HOTEL MANAGEMENT LTD VS S. V. GIDOOMAL & OTHERS NAI HCCC NO.**

**1736/998 UR.**

It was held that a stay of execution cannot be granted in respect of an order which was not granted. Likewise where an application for injunction is dismissed there is no order capable of being stayed because there is nothing the Applicant has lost. I will therefore not grant prayer (1) of this application.

Prayer (2) seeks a temporary injunction. The principles for granting an injunction are well laid down in the case of **GIELLA VS CASSMAN BROWN [1973] EA 358**. As I have indicated above, the Applicants herein were served with the Court of Appeal order on 18/1/2012 when from the copies of the receipts annexed herein they had paid rents. For those whose rents are paid up to May 12 they should submit themselves to the new management or opt to quit, come the new month of June 2012.

The temporary injunction order I hereby issue will only cover the tenants who have paid up to the end of the year. Thereafter they too should submit themselves to the new management if they are keen on renewing their tenancy. The rents received by the 1<sup>st</sup> Respondent in contravention of the orders issued by the Court of Appeal shall be recoverable from the 1<sup>st</sup> Appellant once they sought out the family wrangles over the building.

Prayer 2 succeeds only to the extent explained above. The Appellants/Applicants and the 1<sup>st</sup> Respondent will each pay their own costs. Since the 2<sup>nd</sup> Respondent was acting on the instructions of the 1<sup>st</sup> Respondent, the latter will pay his costs.

**DELIVERED, SIGNED AND DATED AT EMBU THIS 6<sup>TH</sup> DAY OF JUNE 2012.**

**H.I. ONG'UDI**

**JUDGE**

**In the presence of:-**

**Mr. Gachie for 1<sup>st</sup> Respondent**

**Mr. Muraguri for Mbogo for Appellants**

**Njue CC**