



REPUBLIC OF KENYA

High Court at Machakos

Civil Appeal 181 of 2010

KIMEU KIETI & 184 OTHERS APPELLANTS

VERSUS

KENYA MEAT COMMISSION RESPONDENT

R U L I N G

Before me is an application by way of **Notice of Motion** dated 20/12/2010 and filed on 21/12/2010 by the appellant. The application was filed under **Order 40 rule 4 (1), 2(2)** and **Order 42 rule 6**, and **Order 51 rule 1** of the **Civil Procedure Rules** and section 3A of the **Civil Procedure Act (Cap 21 of the Laws of Kenya)**. It has 6 prayers, 2 of which have already been spent as follows:-

1. (Spent).
2. (Spent).
3. **THAT Civil Appeal No. 181 of 2010 in Machakos file be transferred to Nairobi for purposes of hearing the application herein.**
4. **THAT all proceedings and implementation of the ruling of 10th December 2010 in CMCC No. 834 of 1995 be stayed pending hearing and determination of this appeal.**
5. **THAT the respondent be restrained from interfering with the applicant and peaceful occupation of their homes pending hearing and determination of this appeal.**
6. **THAT the cost of this application be provided for.**

The application has grounds on the face of the Notice of Motion. The grounds are that the appeal has very high chances of success; that irreparable loss will be occasioned to the applicants unless the proceedings and implementation of the ruling of 10th December 2010 in **CMCC No. 834 of 1995** are stayed; and that the applicants are willing to abide by reasonable terms set by the court; and that the appeal would be rendered nugatory unless the orders sought were granted.

The application was filed with a supporting affidavit sworn on 20th December 2010 by **George Muniafu**, one of the appellants. In the affidavit, it was deponed *inter alia* that a ruling was delivered on 10/12/2010 stating that the appellants validate their stay by paying rent arrears within 40 days and continue paying rent as and when it fell due; that the orders were given by the subordinate court without taking into consideration the fact that the appellants were under a free housing scheme; that the respondent having entered into a consent with the appellants to stay in the suit premises until it pays them all their

outstanding benefits and dues, could not turn around and deny them the same; that on the basis of the court's ruling the respondent had proceeded to issue notices to the appellants intending to evict them; that it would only be fair if the orders sought herein were granted.

The appellants filed written submissions through their advocates **M/s Wangala Oundo & Company** on 28th July 2011. It was contended that the learned magistrate erred in varying the injunction orders of 15th November 1994 despite there being no new facts. Reliance was placed on the case of **Reef Building Systems Ltd –vs- Nairobi City Council – Nairobi HC Civil Case No. 1357 of 2001** wherein **Ringera J.** set out the circumstances in which injunctive orders could be discharged or varied or set aside. It was argued that there was a valid consent between the parties, which could not be varied by the court. Reliance was placed on the case of **Giella –vs- Cassman Brown Ltd (1973) EA 358** on the grant of injunctive orders. Counsel also relied on **Shah –vs Dharamshi – Civil Suit No. 370 of 1978** in which, counsel argued, the principles upon which a court may vary or review its own judgment were enunciated.

The respondent through counsel **M/s Mulwa & Mulwa Advocates** filed written submissions on 2/12/2011. It was contended that in **Machakos HC Misc. Application No. 143 of 2009** the High Court held that it was the appellants who were in contempt for failing to pay rent. It was contended that, after getting previous injunctive orders, the appellants went on to abuse those orders to the detriment of the respondent. Therefore there were new matters or facts on which the subordinate court could vary the existing injunctive orders. It was lastly, urged that granting the orders sought herein would be tantamount to overturning the orders or decision of **Lenaola J.** It was contended that the principles in **Giella –vs Cassman Brown Ltd** do not apply in favour of a party who has abused court orders.

At the hearing of the application, **Mr Wangalwa** made submissions in support of the application. **Mr Mutia** made submissions in opposition to the application.

I have considered the submissions, both written and oral.

Though there is a prayer for the transfer of this appeal No. 181 of 2010 from Machakos to Nairobi for hearing the application, the submissions do not address this prayer. I take it that the prayer has been abandoned. In any case, no tangible reasons have been given to justify such a transfer.

The parameters to be taken by a court in an application for an interlocutory injunction are settled. They have been stated and restated by the courts. They are clearly spelt out in the famous case of **Giella –vs- Cassman Brown Ltd (1973) EA 358**.

The appellants are in occupation of the premises, that is residential houses. The appellants appear to have been allocated those houses when they were employees of the defendant. They were later declared redundant but not paid their dues. The defendant was to sort out the issue of payment of their dues before they leave the houses. The defendant has not informed the court that they have sorted out the issue of payment of dues and terminal benefits to the appellants.

In my view, with the facts placed before me, the appellants have demonstrated a prima facie case with probability of success. I so find.

Will the appellant suffer irreparable damage if the injunction orders are not granted? In my view they will. They are already in Situ. Their dues have neither been paid nor offered to be paid by the respondent. If they are evicted, they will have to relocate with nothing in their pockets to facilitate the adjustment to a new environment and circumstances. The loss to be suffered cannot be quantified in monetary terms. Therefore it is my finding that the appellants will suffer irreparable loss if an interlocutory injunction is not granted.

What about the balance of convenience? In my view, the balance of convenience is in favour of the appellants. They are merely victims of circumstances. They have not ceased to be employees of the defendant because of their fault. Therefore, they deserve the protection of the law, since their employer has not sorted out the issue of their terminal benefits.

I have been told that granting the orders sought will be tantamount to varying **Lenaola J's** decision. Far from it. The issue here is about a decision made by the subordinate court in **CMCC No. 834 of 1995** on 10th December 2010 and its enforcement. It has nothing to do with the High Court's decision.

In addition to the above findings on the grant of injunctions, under **Order 42 rule 6** of the **Civil Procedure Rules**, this court as an appellate court has wide discretion in granting stay of execution orders of the court's decisions pending appeal where substantial loss may result to the applicant and the application is made without unreasonable delay. The court may order provision of security. The appellants have asked for stay of execution. With the facts placed before me, I am of the view that if stay of execution of the judgment of the lower court is not granted, the appellants will suffer substantial loss. I do not find it necessary to order provision of security by the appellants. However, the appeal has to be heard expeditiously.

For the above reasons, I allow the application and grant prayer 4 and 5. However, the orders herein granted will be valid only up to 31/12/2013, by which time the appeal should be heard.

Costs of the application will follow the decision in the appeal.

Dated and delivered at Machakos this **30th** day of **November** 2012.

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George Dulu
Judge

In the presence of:

Mr Wangalwa for appellants

Mr Meme holding brief for Mr Mulwa for Respondents

Nyalo – Court clerk