



REPUBLIC OF KENYA
HIGH COURT OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 192 OF 2011

(Being an appeal from the Order made by Hon. Mrs. Njora, Principal Magistrate, Milimani Commercial Courts, Nairobi on 28th April 2011)

DAVID KINYANJUI NJENGA
MONICA WANGUI NJENGA
**GRACE NJERI NJENGA.....APPLICANT/
APPELLANTS/ORIGINAL DEFENDANT**

VERSUS

MAUREEN WAITHERA MWENJE
ERIC KAMAU MWENJE
STEPHEN NYAMU MBINJIWE T/A LIFELINE
TRADER.....RESPONDENTS/RESPONDENTS/ORIGINAL PLAINTIFFS

RULING

Application for stay of execution of the subordinate courts' order dated 29 April 2011)

I. INTRODUCTION

1. Being dissatisfied with the ruling of the subordinate court at Nairobi, the applicant/Appellant/Original Defendant filed this appeal to this High Court on 3 May 2011. An application by way of a Notice of Motion dated 29 April 2011 and filed on 5 May 2011 under certificate of urgency and ex parte orders granted by the duty judge on 5 May 2011.
2. Interparte hearing was heard on 12 May 2011.

3. Before the interparte hearing, it transpired that there existed multiplicity of suits in this matter that came to nine cases including this appeal.

4. In brief, one Njenga Mathi, the proprietor of Land parcel L.R 10060/8, LR 10060/9; LR 10060/12 entered into a sale agreement, with one David Mwenje (now deceased). The sale agreement was never finalized. Njenga Mathu filed HCC 3195 of 1993 (Nairobi). This suit was never finalized. Njenga Mathu then sold the suit premises to David Kinyanjui Njenga and two others. He withdrew that case. The three persons he sold to happened to be his children. The children then filed HCCC 110 of 2000 against David Mwenje now deceased. The suit abated. The children of David Mwenje as legal representatives sued David Kinyanjui Njenga, the son of the original proprietor in HCC 243 of 2009 in adverse possession. The case was struck out (Machelule J). The children of David Mwenje filed an appeal to the court of Appeal civil application 41 of 2011.

5. This Court of Appeal case is still pending. It south an injunction and stay of execution of striking out the case against them.

6. The children of the Original Proprietor then levied distress basing the same on a sale agreement that appears to have a clause in default of the agreement rent would be due and payable. They sent auctioneers and attached the goods for the children of David Mwenje. The said children then filed a case in the Chief magistrate's court case No. 662 of 2011 for orders restraining the Defendants from levying distress on grounds that they had never been the tenants to the said Defendants. The Defendants argued that as the claim for adverse possession had been rejected, first by Mbogholi Msagha J in an application then by the Hon. Justice Machelule J on striking out of the suit, there was nothing left but the issue of rent.

7. The trial Magistrate ruled that the attachment was illegal. That all the goods should be released to the applicant/plaintiffs.

8. The defendant then filed this appeal CA 192 of 2011 and sought for orders of stay of execution. They obtained exparte orders as stated above. They then filed a new suit in the High Court HCCC 121 of 2011 for auctioneer of the children of David Mwenje, which suit had not been served.

9. I was further made to understand that there is a succession cause No.1059 of 2009, the Estate of David Solomon Kamau Mwenje which is still pending.

II. APPLICATION 29 APRIL 2011

10. The Applicant/Original Defendant/Appellant seeks restraining orders that goods held by the auctioneers should not be released. That the said orders given were so done in error. This was based on the original sale agreement that stated rent ought to be paid where the sale agreement failed.

11. The respondent/original plaintiff/respondent stated there was never a tenant/landlord relationship. The best the Appellants could do is claim they were trespassers. If this is so, you cannot levy distress against a trespasser. This therefore, explains the new suit filed by the appellant of HCCC 121 of 2011 for auction and more profits.

III. FINDINGS

12. There is a Court of Appeal file No.41 of 2011 still pending on this matter, namely are the respondents entitled to adverse possession or not?

13. When the HCC 243 of 2009 case was struck out, it appears that the appellant attached the properties for rent. The issue therefore arises are the respondents tenants or legal representative to the new alleged owner of the property and applicant herein?

14. I believe the trial Magistrate is correct in holding that distress of rent cannot be taken up. That the attached goods be released.

15. I would find that an application to restrain the orders of the trial Magistrate for stay of execution must fail.

16. It is hereby ordered that the application dated 29 April 2011 be dismissed with costs to the respondents.

17. The main appeal on the same point is pending.

RULING DATED THIS 30TH DAY OF MAY 2011 AT NAIROBI.

M. ANG'AWA

JUDGE

Advocates

a. N. Kaburu instructed by Nelson Kaburu & Co. Advocates for the Applicants/Appellants/Original Defendants.

b. K. Chebii instructed by M. K. Chebii & Co. Advocates for the Respondent/Respondents/Original Plaintiffs