REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
(Coram: Ojwang, J.)
CIVIL CASE NO. 416 OF 2009

1. HENSON NIGEL GRAHAM
2. STEPHEN FEWELL.....PLAINTIFFS/RESPONDENTS
-VERSUS-
DIVINA JEROP CHERUIYOT.....DEFENDANT/APPLICANT

RULING

The defendant moved the Court by Notice of Motion dated **3rd June, 2009**, brought under Orders XLI (Rule 4) and L (Rules 1 and 2) of the Civil Procedure Rules. There is one substantive prayer outstanding:

"THAT, pending the hearing and determination of the appeal filed from the Court's Ruling and Orders of *28th May, 2010*, this Court be pleased to issue a stay of execution of the said order and Ruling of *28th May, 2010*."

The application rests on the following grounds:

*(i) this Court, on **28th May, 2010** delivered a ruling on the plaintiffs' Notice of Motion of **18th November, 2009**;*

(ii) the effect of the Ruling was to grant a mandatory injunction compelling the defendant to vacate the plaintiff's premises, L.R.. No. 2847/I/MN, pending the hearing and determination of the main suit;

(iii) there is a real likelihood that the plaintiff will immediately execute the said Court Order;

(iv) the defendant has since appealed to the Court of Appeal, from the said Order;

(v) if the plaintiff is allowed to execute the Order, the defendant stands to suffer immensely — for the pending appeal will be rendered nugatory; the defendant stands to lose income from business sales if she is evicted; she stands to lose business goodwill.

The defendant's Advocate, **Mr. Michael Maundu** swore an affidavit in support of the application. In response, 1st plaintiff swore an affidavit (dated **19th June, 2010**) averring that the plaintiffs are the registered owners of the suit premises, and that the defendant has no colour of right to be on the suit premises. The deponent avers that the plaintiffs purchased the premises free of all encumbrance, and no leasehold interest was registered against the suit property; and that the plaintiffs have granted the defendant no leasehold, and thus she is merely a trespasser.

Counsel for the applicant submitted that this Court, as it is the one that made the Order of **28th May, 2010** which is now the subject of appeal, has the discretion to entertain the instant application.

Counsel relied on the Court of Appeal decision in **Halai & Another v. Thornton & Turpin (1963) Limited** [1990] KLR 365, in which the relevant principle was thus stated:

"Thus, the superior Court's discretion is fettered by three conditions. Firstly the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly, the applicant must furnish security. The application must, of course, be made without unreasonable delay."

On the limb of *"sufficient cause"*, counsel urged, firstly, that the arguability of the claim must await the appeal hearing; but, secondly, he wanted to show that the applicant stood to suffer harm, pending the hearing of the appeal. Counsel submitted that the applicant runs a business outfit, which was her source of livelihood: so if the Court's Orders are executed pending the hearing of the appeal, the applicant's livelihood would be jeopardized.

On the question of the merits of the appeal, counsel invoked the Court of Appeal decision in **Keter & 6 Others v. Kiplagat & Others** [2004] 2KLR 159, at page 162:

"An arguable appeal does not mean an appeal which must succeed. All that an applicant must show the Court is that his appeal or intended appeal is not frivolous."

Counsel also relied on yet another Court of Appeal decision, **ABN Amro Bank, NV v. Le Monde Foods Limited,** Civil Application No. Nai 15 of 2002:

"….. as we have said before in this kind of application, a supplicant for an order of stay need not show that he has a chain of arguable points. One arguable point is sufficient."

As regards the likelihood of incurring substantial loss, the applicant showed evidence of bar-and-restaurant business which she is carrying out on the suit premises; and it was urged that she had evolved a two-year goodwill in that business: she stood to lose both.

Counsel for the respondent submitted that this Court, after making the Orders from which the appeal is being lodged, became *functus officio* and was no longer in a position to grant the orders sought: *"because by granting a stay of the Order, the Court will be reviewing its own orders or granting an injunction in favour of the defendant, to the detriment of the plaintiffs."* Counsel submitted that the *"applicant's recourse is to the Court of Appeal ……"*

Counsel submitted that *"the defendant who is a mere trespasser on the plaintiff's plot cannot suffer any substantial loss …. if she is removed from the premises."*

By the Ruling of **28th May, 2010**, this Court determined the relevant issues in clear terms, and thus held:

"The defendant states that she entered into an agreement for sale to her of the suit property on *12th January, 2009*; the property was not transferred to her, as on *7th October, 2009* it was transferred instead to the plaintiffs herein.

"There may be a dispute based on *contract,* as between the defendant and the administrators of the original title-holder's estate; but it does not, as judged from the state of the pleadings, involve the *plaintiffs,* who have every right to enjoy their property. This right cannot be taken away, so as to accord the defendant an opportunity to bring in a third party, as liability is likely to attach only to the *third party*; and the full loss that is destined to fall on the plaintiffs, in those circumstances, may not be remedied.

"Consequently, special *circumstances* have, in my opinion, been raised which justify the award of a *mandatory injunction.*"

The merits of the appeal, which, of course, stand to be determined by the Court of Appeal, are intimately

linked to the foregoing point. Is there a serious appeal before that Court? Does the appeal have sufficient cause?

Although the applicant has undertaken to provide security against loss to the plaintiffs if the appeal is disallowed, the mere availability of resources to stand as security must not appear as a subterfuge, aimed at achieving oblique objects: an application for orders of stay of execution of a mandatory injunction, founded on cogent grounds, must first be shown to exist. The ability to provide security, in this respect, is but a secondary consideration.

The special character of the mandatory injunction was remarked in memorable words by **Mr. Justice Megarry** in **Shepherd Homes Limited v. Sandham** [1971] 1 Ch.340, at p. 348:

"As Kindersley, V-C said in *Gale v. Abbott* (1862) 10 W.R.748, an interlocutory application for a mandatory injunction was one of the rarest cases that occurred, *'for the court would not compel a man to do so serious a thing as to undo what he had done except at the hearing.'* Even if today the degree of rarity of such applications is not quite so profound, the seriousness of such an order remains an important factor. Another aspect of the point is that if a mandatory injunction is granted on motion, there will normally be no question of granting a further mandatory injunction at the trial; what is done is done, and the plaintiff has on motion obtained, once and for all, the demolition or destruction that he seeks."

The respondent has relied on the foregoing reasoning to urge that granting the applicant an order of stay would amount to reversing the mandatory order of injunction: I am, however, not in agreement, as the grant of orders of stay is only a management scheme for the process leading to the hearing of an appeal.

The respondent has also contended that the Court, once it granted the mandatory injunction, became *functus officio* and no longer has jurisdiction: again I am not in agreement with this submission, as there is no provision of law that deprives the Court of its jurisdiction to deal with applications touching on orders already granted and especially orders that are leading to an appeal.

However, the foundation of the mandatory injunction granted on **28th May, 2010** was clearly stated, and it is not apparent to me that any serious appeal is being put up by the applicant. Without the conviction that the applicant has a grievance for appeal that is not frivolous, I am not able to grant the main prayer in the application.

Accordingly, the applicant's Notice of Motion of **3rd June, 2009** is disallowed, with costs to the plaintiff/respondent.

DATED and **DELIVERED** at **MOMBASA** this **6th** day of **May, 2011.**

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J. B. OJWANG
JUDGE