



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC APPL NO. 403 OF 2011

**SAMUEL NGUGI NYAMU** ..... **APPLICANT**

**VERSUS**

**NJENGI PROPERTIES LIMITED** .....**RESPONDENT**

Coram : Mwera J.  
Gitonga for Applicant  
Ms. Nandwa for Respondent  
Njoroge court clerk

### **RULING**

The applicant has come to this court by way of a notice of motion dated 16.9.11 brought under sections 1A, 1B, 3C of the Civil Procedure Act and Order 42 rule 6 (1) of the Civil Procedure Rules. He prays that the ruling and order of 12.9.11 in the CMCC 122/11 and the interim orders issued there on 3.2.11 and confirmed on 28.4.11 be reinstated, until an intended appeal is disposed of.

It was contended in the grounds that the applicant and the respondent herein executed a lease agreement of 9.7.07 with the applicant taking Floor 2 Suite No. 227 of LR No. 209/1212/2 Uniafric House, for 6 years. Then on 3.12.10 the respondent purported to terminate the lease and throw out the applicant w.e.f 28.2.11. On 27.1.11 the respondent disconnected water and power to the leased premises, followed by eviction on 28.11.11 even before the lease ended. So the applicant instituted CMCC No. 122/11. That court issued an injunction which was confirmed on 28.4.11 against the respondent. The lower court further issued a mandatory injunction directing the respondent to restore the subject premises to the state they were in prior to 26.1.11 and also to return all the property of the applicant. Then on 12.9.11 that court dismissed the applicant's application dated 02.9.11 and vacated the mandatory orders of 03.2.11 which had been conformed until final determination of the suit. The applicant now intends to appeal against that ruling of 12.9.11 – hence this stay application, otherwise he suffers irreparable (not substantial ?) loss.

In the supporting affidavit the applicant added that after confirmation of the lower court orders of 28.4.11 the respondent's application in HCMISC C.

APPL. 236/11 for stay was dismissed. But when the respondent failed to return the applicant into the premises contempt/defiance proceedings were commenced in an application dated 4.8.11. To this, the

respondent was directed to file a replying affidavit by 19.8.11 but has not done so to date.

On 19.9.11 the applicant was granted an interim stay.

On 22.9.11, the respondent filed a notice of motion praying that the *ex parte* orders of 19.9.11 be discharged/vacated because they were obtained through misrepresentation, deceit and fraud. That the present applicant's actions were reprehensible, in breach of the law and Civil Procedure Rules and they were null and void. There was a supporting affidavit sworn by Clara Nandwa Advocate, acting for the respondent/applicant.

On 23.9.11 the court directed that each side do file whatever affidavits relating to the 2 applications dated 16<sup>th</sup> and 19<sup>th</sup> September 2011 so that they could be heard together. However, Ms Nandwa's supporting affidavit averred that when the applicant Samuel Ngugi, got *ex parte* orders on 16.9.11 he had through his lawyer, misled the court by claiming that he used the suit premises as a school. But he did not disclose that he had not been in occupation since

28.1.11 or that w.e.f 1.2.11 M/s Mukami Mwangi & Co. Advocates had been in occupation instead. Thus Sammy Ngugi could not run a school there. And that the order of 12.9.11 did not throw the applicant/respondent, Sammy Ngugi, out of the premises.

In reply to the application dated 16.9.11 by Sammy Ngugi, Esther Ngige, the managing director of the respondent, Njengi Properties Ltd deponed that the lower court gave a temporary injunction and orders to reinstate the applicant in the premises on 28.4.11. The respondent opposed that application and the same came for *inter parties* hearing on 11.2.11. The deponent narrated the steps, applications orders etc taken or given until the proceedings came before this court on 19.9.11 and the orders that were granted. Then the grounds of opposition were expanded on to the effect that the applicant had been out of the premises since January 2011 and that another tenant was already *in situ*, things that the applicant had not disclosed on 19.9.11. If he had done orders could not have been given in his favour. Those orders therefore ought to be vacated.

And the applicant/respondent Sammy Ngugi replied to the motion dated 22.9.11. He denied misleading the court to obtain orders of 19.9.11. So they should stay.

Directed to submit the applicant Sammy Ngugi, went over the history of their litigation again, from the lower court to the present and urged the court to confirm the orders of 19.9.11 while refusing the respondent's application dated 22.9.11.

And on its part the respondent also reviewing the proceedings in the same manner, ended with a plea that its own prayers be granted, while those by the applicant are refused. Each side cited authorities on the jurisdiction of this court to grant whatever prayers one way or another.

Having considered all the above this court is minded to find that the best way to determine or settle all the issues herein, the parties should fast track to institute, process and prepare to argue the intended appeal. These applications upon applications by either side will seemingly not end.

Accordingly, the parties are directed to go back to the *status quo* as at 12.9.11 and proceed with the intended appeal without delay. In the event of success, the applicant will then prove his loss and pray the same to be compensated with money. After all if he has been out of the premises since January 2011 and this is October, loss has already been suffered. But it can be assessed.

Orders accordingly with each party bearing its own costs.

Delivered on 25.10.11.

**J. W. MWERA**

**JUDGE**