REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 39 OF 2011

SUKAINA RIZUI.....APPELLANT

V E R S U S

SADIQ TAYIB MOHAMED.....RESPONDENT

RULING

This ruling is on an application filed herein on 31st March, 2011 in which the applicant seeks the following three orders:-

(i) That the Honourable Court be pleased to stay the execution of the Ruling delivered on the 11th March, 2011 Misc. Appl. No. 254 of 2010 in Senior Resident Magistrate's Court at Mombasa by Hon. Mr. M. K. Mwangi, pending the interpartes hearing and determination of the instant application.

(ii) That the Respondent, his servants, agents and/or employees be restrained by way of temporary injunction from dealing, selling wasting, damaging, intruding, developing and/or interfering with goods taken by M/s Kinyua Auctioneers from his premises until hearing and determination of this application.

(iii) That the Respondent, his servants, agents and/or employees be restrained by way of mandatory injunction from dealing, selling, wasting, damaging, intruding, developing and/or interfering with goods taken by M/s Kinyua Auctioneers from his premises and the same be released to the Applicant herein.

Upon looking at the affidavits filed by both parties, this court formed the view that the affidavits provided scanty information about the background of the dispute. The court, therefore, called for and studied the lower court file in Misc. Application No. 254 of 2010. As I now understand it, Sadiq Tayib Mohammed(the '***landlord***') is the owner of property described as Mombasa/BlockXXXVII/107. On it stands a building, a portion of which is leased to Sukaina Rizui (the '***tenant'***) as a residential house. It is the landlords' position, that as at 15th November, 2010 the tenant was in rent arrears of Kshs. 18,040/- and so he sought to distrain for it under the provisions of the Distress of Rent Act. His agent M/S Kinyua

Auctioneers ran into difficulty when the tenant frustrated his access to the premises and so he applied for a break in order from the lower Court. That was granted on 20th December, 2011 and two days later the Auctioneers broke into the premises and carted away some goods. Not surprisingly, the Tenant sought to reverse her misfortune in an application dated 24th December, 2011. The Learned Magistrate dismissed that application in a decision rendered on11/03/2011. This Appeal stems from that decision.

I now turn to deal with the matter at hand. The Tenant seeks to stay execution of the ruling of 11th March, 2011. One must keep in focus the prayers declined by the lower court so as to fully contemplate the implication of granting a stay. The tenant had sought the following orders:-

(i) That the Honourable Court be pleased to stay the execution of the Ruling delivered on the 11th March, 2011 Misc. Appl. No. 254 of 2010 in Senior Resident Magistrate's Court at Mombasa by Hon. Mr. M. K. Mwangi, pending the interpartes hearing and determination of the instant application.

(ii) That the Respondent, his servants, agents and/or employees be restrained by way of temporary injunction from dealing, selling wasting, damaging, intruding, developing and/or interfering with goods taken by M/s Kinyua Auctioneers from his premises until hearing and determination of this application.

(iii) ***That the Respondent, his servants, agents and/or employees be restrained by way of mandatory injunction from dealing, selling, wasting, damaging, intruding, developing and/or interfering with goods taken by M/s Kinyua Auctioneers from his premises and the same be released to the Applicant*** *herein.*

To grant stay would be to take back the parties to the position they were before the rejected application was filed. At that time the landlords' agent had attached the tenants goods and had them in his possession. This is precisely the same set of affairs obtaining after the court declined to grant the application. This is so because save for the order on costs, the learned magistrate did not order that something be done or that some action be not taken. He simply dismissed the application with costs. Apart from costs, there is nothing to stay; the futility of granting a stay order is clear. The futility, and therefore, the refusal to stay negative orders has been discussed on previous occasion. The Court of Appeal in **Nrb Civil Application No. 40 of 2008 Mwambeja Ranching Company Ltd -Vs- Kenya National Capital Corporation Ltd & Another said as follows:-**

"The predecessor of this court made this clear in the well known case of Western College of Arts and Applied Sciences –Vs- Wanga & Others [1926] KLR 63. The Superior Court merely dismissed the applications and the Court cannot stay a negative order."

See also the decision in **Civil Appeal 62 of 2004 Exclusive Estate Ltd –Vs- Kenya Posts and Telecommunication Corporation & Another 531 EA 53.**

On costs, the Court of Appeal in Civil Application No. 298 of 1996 **Francis Kabaa and Nancy Wambui & Another** in *obter dictam*, doubted whether stay could be granted in respect of costs. Even if it was grantable, the tenant has not demonstrated or proved that the landlord is unable to refund any costs paid. The order that commends itself to me is that the application for stay be refused and it is so ordered.

The tenant also pitched for restraining and mandatory injunctions. In its appellate jurisdiction the High Court may, in appropriate circumstances, grant a temporary injunction. This would, I think, include a mandatory injunction sought at an interlocutory forum. The conditions for grant of interlocutory injunctions are laid down in the legendary decision of **Giella –Vs- Cassman Brown & Co. Ltd [1973] EA 358.** Both prayers must meet these conditions, but in addition the tenant must demonstrate the existence of special circumstances that would invite the rare grant of a mandatory injunction at an interlocutory stage.(See the decision in **Civil Appeal No 160/95 Gusii Mwalimu Investment Co Ltd**

and Another Vs Mwalimu Hotel Kisii Ltd)

The Memorandum of Appeal sets out 10 grounds. At the full hearing of the appeal, this court will receive full arguments on the Memorandum and determine it on it's merit. At this stage of the proceedings the law enjoins me to simply consider whether or not the tenant has presented a prima facie appeal with a probability of success and to do so without preempting the final outcome of the appeal. Going by the Rent Control Certificate dated 11th June, 2011 displayed as an annexure to the landlords affidavit, the tenants tenancy was decontrolled when rent was increased to Ksh5,760/= per month. So from 11th June, 2011 (when the Certificate was issued), the tenant no longer enjoyed the special status and protection offered by the Rent Restriction Act. A default in rent payment would be exposing her to distress without the sanction of the Rent Restriction Tribunal. The tenant seems to concede that some rent is in arrears and was in arrears when the distress commenced. What is in contention is the exact amount. The Distress for Rent Act in Section 3 gives the remedy of distress to the landlord to recover for rent in arrears. Section 11 of the same Act empowers a subordinate court, on an application of the landlord or his bailiff, to issue a break in order to enter and seize goods that have been fraudulently secured. On the face of it, therefore, the landlord was perfectly entitled to seek the break in order and levy distress. If the tenant wanted to challenge the legality of the distress process then she should have filed a substantive suit in that respect. At this stage I am unable to say that this is the strongest of appeals and

I am inclined to hold that no prima facie appeal has been demonstrated. But I may be wrong and so I subject the application to the second test.

An interlocutory injunction would not normally be granted unless it can be shown that the applicant is likely to suffer irreparable injury which cannot be adequately compensated in damages. There will, of course, be instances when the court will grant an injunction notwithstanding that an award of damages would adequately compensate the aggrieved. These include instances when the conduct of the respondent is high handed or plainly blatant and unlawful. As I had earlier held the landlords conduct does not appear to be unlawful and is on the contrary sanctioned by the law. I must now exam whether the tenant is likely to suffer irreparable injury if I reject the plea for injunction. In paragraphs 5 of her affidavit the tenant avers that she will suffer great loss if the orders are not granted. This kind of averment is more appropriate in satisfying the condition for stay set out in order 42 rule 6(2) which requires the applicant to show the risk of substantial loss. The test for an injunction is higher, one must show the likelihood of suffering irreparable damage. Nothing in the applicants 11 paragraph affidavit in support of the application alleges or demonstrates that likelihood. It has not been said or shown that the attached goods are priceless or irreplaceable or that the landlord cannot pay for the double damages and costs provided for by Section 8 of the Distress for Rent Act if it were to be found that the distrain was wrongful.

Ultimately, I can only reach one conclusion, the application is unmerited and is hereby dismissed with costs.

Dated and delivered at Mombasa this 2nd day of November, 2011.

F. TUIYOTT
JUDGE