



Editorial Summary

1. *Civil Appeal*
2. *Civil Practice & Procedure*
3. *Subject of Subordinate Court Case*

LAND

- 2.1 *LR 36/11/42 10th Street Eastleigh Nairobi*
- 2.2 *Appellant/original plaintiff alleged to have loaned moneys to respondent/original defendant to complete construction of premises*
- 2.3 *Agreement that appellant original plaintiff would occupy premises for 20 years*
- 2.4 *Relationship not of landlord/tenant but probable licensee*
- 2.5 *Respondent/original defendant claim rent arrears Ksh. 4,550,000/-*
- 2.6 *Files reference/notice to the Business Premises Rent tribunal 30th December 2009*
- 2.7 *Appellant original plaintiff files suit in magistrate's court CMCC 8809/09 seeking orders of injunction to restrain respondent/Original defendant from evicting him from suit premises (22nd December 2009)*
- 2.8 *Trial magistrate grants orders of injunction under Order XXXIX Civil Procedure Rules*
- 2.9 *After interparte hearing on 29th March 2010 Hon. Magistrate confirms grants injunctive orders.*
- 2.10 *Orders disobeyed – distress for rent arrears amounting to*

*auction of original plaintiff. Disregarded orders of
21st May 2010*

2.11 *Contempt proceedings filed seeking respondent original
defendant, be committed to civil jail under Order 39 r 2A
Civil Procedure Rules*

respondent

2.12 *Trial Magistrate in Ruling held orders did not stop
original defendant from levying for distress. Section 8 of
distress for rent Act Cap 293 provides for wrongful
distress*

orders.

2.13 *Notice of motion 26th May 2010 for review setting aside*

2.14 *Hon. Trial magistrate sets orders of 21st May 2010 aside*

2.15 *Appellant original plaintiff appeals.*

4. *Appeal*

Held:

i) *That status of parties be as it was at the
stage the temporary injunction was issued.*

ii) *Judgment 4th October 2011*

5. *Respondent alleges new tenants in premises*

i) *Ali Shakul Osman*

ii) *Mohammed Suleiman*

6. *Court Summons tenants but fail to attend.*

7. *Orders to reinstate appellant*

8. *Tenants appear before court to resist possession of The appellant of premises but tenants do not Appear to court.*

9. *The orders of reinstatement at abeyance.*

10. *The alleged two tenants*

11. Landlord moves to the subordinate court –

Hon. Magistrate struck out suit.

12. Alleged two tenants return to court. There is nothing left of the case, therefore of the Appeal matter.

13. In reply:

Orders rendered incapable of being enforced.

14. Held:

- i) That the application 29th November 2011 is dismissed.
- ii) Original plaintiff be reinstated.
- iii) Suit by Hon. Magistrate reinstated.

15. Case Law:

16. Advocates :

i) G.B. Miyare instructed by M/s Lumumba, Mumma & Kaluma & Co Advocates for the appellant/original plaintiff

ii) H. N. Lakicha instructed by M/s Hassan, Bulle & Co Advocates for the Respondent/original defendant

iii) M. M. Issa instructed by M.M. Issa & Co Advocates for the Interested party

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CIVIL APPEAL NO. 263 OF 2010

ABDULLAHI ABDI NUR APPELLANT/ORIGINAL PLAINTIFF

VERSUS

KHALIF HASSAN

ABDULRAHMAN RESPONDENT/ORIGINAL DEFENDANT

(Being an appeal from the Decision of Hon. M K Kiema Esq, Resident Magistrate delivered in CMCC No. 8809 of 2009 dated 15th June 2010 at Milimani Commercial Courts, Nairobi)

R U L I N G

I. INTRODUCTION

1. Abdulahi Abdi Nur had filed a suit in the subordinate court, Milimani Commercial court at Nairobi,

seeking orders of protection in his possession of premises situated on land LR 36/11/42, 10th street, Eastleigh Nairobi against the defendant Khalif Hassan Abdulrahman.

2.The subordinate court issued orders of injunction to restrain the original defendant from evicting the original plaintiff. The original defendant levied distress of rent which in effect displaced the original defendant. The injunction orders were disobeyed.

Hon. Trial Magistrate was called upon to punish for contempt.

3.The original defendant stated that whereas there were orders that no eviction would occur it did not preclude the original defendant from levying distress.

4.By orders of 21st May 2010, the Hon. Magistrate ordered that the original plaintiff be reinstated in the premises.

5.The original defendant came with a new application of 26th May 2010 seeking review of the court's order of 21st May 2010 and to set the same aside.

6.The trial magistrate set aside the orders of returning the original plaintiff to the premises.

7.Being dissatisfied, the original plaintiff filed an appeal to this High Court. Upon hearing the parties, the High Court held that the status of the parties be as it was when the original injunction orders were issued pending the hearing of the main suit.

8.There were many issues to be determined. The first was the relationship between the parties. It was not landlord and tenant but perhaps lessor/lease. The issue of jurisdiction that required to also be established by that court.

9.The court ordered the original plaintiff to take back possession of the premises.

10. The original defendant's advocate stated that there were two tenants put into possession named:

- i) Ali Shakul Osman
- ii) Mohammed Suleiman

11. Whereas the two were summoned to court to enable them know of the orders of the court as required by law, on the orders that might affect their rights and or status of being also evicted, the two did not appear in court.

12. The court proceeded to permit the original plaintiff to be reinstated in the premises under the supervision of the court bailiff and protection of that bailiff by the police.

13. This had a positive reaction as the two alleged tenants appeared through their advocate when in fact they did not personally appear.

14. The orders of this court was not stayed. New date for hearing was taken on the issue of the alleged two tenants.

15. The original defendant proceeded to the subordinate court. The original file that was in the High Court was also returned to the subordinate court where the Hon. Magistrate was then persuaded that that court had no jurisdiction to hear the whole suit. The

Hon. Magistrate struck out the entire suit.

16. When the parties returned to this High Court, the impression given is that because there now no

longer is a suit in the subordinate court, there is nothing left of this appeal and the suit in the subordinate court.

17. The orders of this court requiring the two alleged tenants to be evicted in order to bring the status back to the one when the injunction was originally issued, namely original plaintiff was an occupier of the premises be discharged.

18. This position as argued by the two intended tenants was supported by the original defendant.

19. The original plaintiff opposed this application.

II FINDINGS

20. Justice should not be made a mockery of in halls of law.

21. The purpose of injunction is to maintain the status that existed between the parties before the dispute arose.

22. What was a simple matter that the original defendant required to do has become very complex due to trying to resist the

Hon. Magistrate's original orders of injunction.

23. The original defendant was aware that there were orders of the High Court on appeal requiring the injunction orders to be reinstated be complied with and obeyed.

24. That there was a deliberate misrepresentation to the

Hon. Magistrate to permit the Hon. Magistrate to dismiss the whole suit without taking into consideration the orders of this court, namely the status of the parties in order that the said parties are heard and are able to ventilate their case in full.

25. In the case law of:

Abigael Wanjiru Mbiri

Vs

Dakianga Distributors Ltd

CA 950/05

Ruling by Mutungi J

There were orders to restrain the landlord from effecting eviction orders pending appeal. During a lapse when there was no judge to extend the orders both parties agreed to take fresh dates and status quo to be maintained. The landlord proceeded to the magistrate court and misrepresented that there in fact was no appeal.

The magistrate caused orders of eviction to be made. The effect was that the tenant was evicted from the premises. The court gave orders she be reinstated, the landlord did not obey the orders but instead put in a new tenant, the proceeded to demolish the premises.

26. The court held that this action by the landlord was unlawful.

27. In another case of

Samwel Nganga Kabudi

Vs

Trust Bank Ltd

HCC 3679/92 (Nrb)

Bosire J

Injunction orders was issued by one Judge to restrain the landlord from evicting the tenant. The issue of jurisdiction was raised in the Business Premises Tribunal and was upheld. The second Hon. Judge in the High Court case discharged the orders of injunction. The landlord moved with speed and evicted the tenant.

28. Bosire J (as he then) held that whereas the were no orders of injunction in place, he did on the doctrine of Les Pendete as found under Section 52 of the Transfer of Property Act. This doctrine merely states that where a land matter is pending in court, no transaction is permitted until the finalization of the court case.

29. The tenant in that matter was order to be reinstated.

30. In a third case law of

M/s Gusii Mwalimu Investment co Ltd & 2 Others

Vs

Ms Mwalimu Hotel Kisii Ltd

CA 180/95

(Tunoi, Shah & Lakha JJA)

The court held that possession must be taken lawfully. In the above case, Shah JA stated that possession was taken in a “*lightening speed*”. This was an illegal action by the landlord. That levying of illegal distress does not place a landlord in good standing in a court of equity.

31. The court did not wish to see itself “assent to occupation of the premises by a third party and assist the landlord perpetuate what it did illegally.”

32. In this present case, the original defendant has attempted to use the law to perpetuate a situation where the original plaintiff is denied not only possession pending hearing of the suit but of the due process of law, fairness and equity.

IN CONCLUSION

33. I would herein find that the application of 29th November 2011 by the two interested parties be and is hereby dismissed.

34. That the two interested parties having appeared to this court through their advocate have not shown sufficient cause to give possession to the original plaintiff.

35. That the subordinate court orders dismissing the original suit be set aside and the suit be reinstated for hearing *ex debito justitae*.

36. That the appeal herein is confirmed that the orders of injunction issued on 21st May 2011 by the Hon. Magistrate do remain the correct status of the parties pending the hearing of the main suit.

37. That the original plaintiff/appellant herein be reinstated in the demise property by the court bailiff. The OCPD Kasarani and OCS Pangani Police Station are to supervise that there is peace to be maintained during this exercise. This order supersedes all other orders.

38. There will be costs to the original plaintiff to be paid by the interested party.

DATED THIS 20TH DAY OF DECEMBER 2011

M.A. ANG'AWA

JUDGE

Advocates :

i) *G.B. Miyare instructed by M/s Lumumba, Mumma & Kaluma & Co Advocates for the appellant/original plaintiff*

ii) *H. N. Lakicha instructed by M/s Hassan, Bulle & Co Advocates for the Respondent/original defendant*

iii) *M. M. Issa instructed by M.M. Issa & Co Advocates for the*

Interested party