



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI Civil Appeal 41 of 2009**

**BARAKUDA KENYA LTD .....APPELLANT**

**VERSUS**

**AVC MANAGEMENT CO. LTD T/A**

**MNARANI CLUB KILIFI .....RESPONDENT**

**RULING**

There are two applications in this matter and the same were heard together.

The Notice of Motion dated 1<sup>st</sup> September 2009 is made under Order XLI Rule 4 (6) and Order L Rule 1 as well as section 3 of the Civil Procedure Act. It seeks for orders of injunction to issue pending appeal, so as to restrain the respondent by itself, servants agents or anybody claiming under it, evicting the plaintiff/applicant from its premises at Mnarani Club, Kilifi or removing the appellant's goods and items therefrom or leasing the said premises to any third party or in any manner whatsoever interfering with the appellants peaceful occupation of the premises pending hearing and determination of this appeal.

It is premised on grounds that:

- (a) The appellant's application for a temporary injunction pending hearing and determination of the suit has been dismissed by the sub-ordinate court.
- (b) The appellant is facing imminent eviction upon which eviction the suit in the subordinate court will be rendered nugatory.
- (c) The appellant stands to suffer irreparably should the respondents not be restrained from evicting it
- (d) There is an arguable appeal.

The application is supported by the affidavit sworn by Uwe Maxine, a director of the appellant company in which he states that the appellant filed a suit seeking for a permanent injunction in the subordinate court at Kilifi, and to maintain the status quo pending the hearing and determination of the appellant's suit, prayer for temporary injunction were sought. The application was dismissed and applicant is apprehensive that respondent is likely to carry out eviction which would result in irreparable damage as respondent has sent appellant a note requiring it to vacate the suit premises. If the orders are not granted, then even the appeal will be rendered nugatory.

The application is opposed on grounds that it is frivolous, misconceived and otherwise an abuse of the court process.

- (2) The appellants are guilty of non-disclosure of facts material in this suit.
- (3) The applicants are in a breach of the relevant provisions of the law and the order of 3<sup>rd</sup> September 2009.
- (4) The appellants have not met the standard for grant of injunction as set out in the case of Giella v Cassman Brown CA 1973 pg 358.
- (5) The conduct of the applicant is not deserving of mercy from this court. Pending interpartes hearing of this application, the applicant interim restraining orders on 3-9-09 when the matter went before Anzangalala J in Mombasa. It is on this basis that the respondent in turn filed an application dated 18<sup>th</sup> September 2008 seeking that those orders (which were extended on 17<sup>th</sup> September 2009) be discharged – the application was made under Order XXXIX Rules 3(3) and 4 and Order L Rules 10 of the Civil Procedure Rules, section 3A and 63(e) of the Civil Procedure Act.

It was premised on the same grounds that were raised in the grounds of opposition filed by the respondent and supported by the affidavit of Wilhoton Pretorus – the resort manager of the respondent Club in which he states that there is no landlord – tenant relationship between the appellant and respondent (as defined under Cap 301 of the Laws of Kenya) capable of protection and/or enforcement by the court. He emphasizes that appellant was allowed to use a portion of the premises without payment of rent at all.

On 1<sup>st</sup> December 2007, they entered into a hospitality agreement which set out certain conditions to the appellants i.e the respondent would:

- (a) Have a free training session for QVC
- (b) Give a 20% discount off the Scuba cost per guest at the club per trip per person
- (c) Pay meals for the staff Ksh. 50/- per person per day
- (d) Give lessons to guests from outside at the club pool with the knowledge of the Resort Manager not more than 8 persons at a time.
- (e) Throughout the subsistence of the agreement no consideration in the form of rent passed between the applicants and the respondents.

On 9<sup>th</sup> June 2009, applicants and the respondent entered into another agreement to terminate their relationships by 30<sup>th</sup> June 2009 (a copy of the termination agreement is annexed)

It is respondent's contention that the termination of the contract was by consent of the parties and not a unilateral decision by the applicant and the dismissal of the injunction application was justified.

- (6) The applicants were in breach of the court order which required them to file an undertaking of damages within 5 days and have the matter fixed for hearing on priority basis within 14 days. Further, that the order of injunction and the entire appeal amounts to an abuse of court process as the order of injunction was not served together with the application and the memorandum of appeal as required. For purposes of convenience, I refer to parties as appellant and respondent.

At the hearing of these applications, Mr. Odongo who held brief for Mr. Magolo submitted on behalf of the appellant that there was substantial loss likely to be suffered as there was already a notice of termination of tenancy served on them with a further notice urging them to leave or face eviction. Mr. Odongo explained that this being a big facility where the appellant has been carrying on business, such action will subject them to irreparable loss and render the appeal nugatory because the tenant/landlord relationship will have ceased to exist.

It is further submitted that, the appeal raises very pertinent issues which will succeed taking into consideration that the agreement provided for termination by giving 3 months notice yet in this instance notice was issued on 9-6-09 to take effect by 30<sup>th</sup> June 2009 which was in itself incompetent.

As regards discharging the temporary orders issued, Mr. Odongo argues that Order XXXIX cannot be used to discharge orders issued under Order XLI and the respondent's application should be dismissed.

He insists that the order for injunction was served together with the application and memorandum of appeal – but that this is not even a requirement under Order XLI.

As regards the notice to terminate, Mr. Odongo contends that the same was not by consent – it was a letter on respondent's letterhead, addressed to appellant informing them that the tenancy would be terminated by 30<sup>th</sup> June.

In response, Mr. Khalwale submits on behalf of the respondent that the "tenancy" relationship was amicably entered into as shown by documents annexed and signed by both parties and there is no allegation of fraud or coercion and so the document dated 9<sup>th</sup> June 2009 (referred to as consent to terminate tenancy) is binding on the parties and the court should interpret that document and give effect to it, moreso because the wording of the document is clear as to the intention of the parties who signed it.

Further, that applicants are guilty of non-disclosure of material facts. Mr. Khalwale submits that there is no arguable appeal and there is nothing to support the claims that this is a controlled tenancy. It is also his submission that the standard set out in the Giella Case has not been reached and the learned trial magistrate correctly observed that no prima facie case with probability of success had been established and the loss could well be compensated by way of damages. It is his contention that on a balance of probability, it's the respondents who stand to suffer by the existence of the injunction as the respondent is a beach hotel offering various services to its customer show are mostly foreigners and by so doing earn the country much needed foreign exchange and the injunction has hampered business – the peak season being September – December and has resulted to respondent losing a fortune.

It is also pointed out that being an equitable relief, the conduct of the parties is crucial and here the conduct of appellant is undeserving and such relief because

- (a) The termination notice was by consent
- (b) There are falsehoods in the affidavit sworn by Uwe Mexiner claiming that documents were served. Mr. Khalwale takes issue with the affidavit of service dated 25<sup>th</sup> September 2001 sworn by Gordon Odhiambo claiming that service of all relevant documents was effected on 5<sup>th</sup> September 2009, yet in that return of service, the only document annexed is the undertaking which was serve don 8<sup>th</sup> September 2009 – and which undertaking was not mentioned by either the process server or Maxiener, in their affidavits so Mr. Khalwale submits that, they are not being honest – wonder the annexing of an unrelated document.

It is also pointed out that there is no tenancy relationship as between the appellant and the respondent and a strict construction of the document giving rise to the relationship makes it more of a license and not a tenancy agreement, and that is why parties did not go before the Business Premises Rent Tribunal.

Mr. Odongo urged the court to find that the document dated 9<sup>th</sup> June 2009, purported to be a consent is nothing of the sort, rather it is a directive by the respondent irrespective of the fact that the appellant signed it, and that those are the very issues being contested in the appeal – also to be raised on appeal is whether what existed was a tenancy or a license.

Mr. Odongo urges the court to consider what the terms of the contract were and to find that the termination document did not comply with the terms of the contract, nor is it indicated that the agreement was issued to reduce notice period to 21 days.

When the appellant sought for temporary restraining orders against the respondent pending hearing of the suit, the application was dismissed on grounds that the effect of granting those orders would be determining the suit at the interlocutory stage and that a prima facie case with probability of success had NOT been made as to warrant grant of the orders.

Order XLI, generally address the issue of appeals – Rule 1 (2) of the said order sets out what the memorandum of appeal should contain.

Although this is an application for injunction pending appeal – the arguments set forth are based on a mix of Order 4 rule 2(1) (a). Rule 6 does recognize that grant of temporary injunctions may issue on terms which the court seems fit provided that the procedure for instituting an appeal from subordinate court has been complied with.

The manner in which this application is conducted is such that really what appellant is doing is re-arguing the same application that was before the lower court on pretext that an injunction is sought pending appeal and its almost as though part of the appeal is being argued at this interim stage eg – whether a prima facie case has been made out to warrant grant of the injunction (and so interested with whether there is an arguable appeal) is the same subject that the lower court addressed and made finding on – to my mind for this court to address and determine the issue at this stage will in effect determine the appeal before it is even heard and render the appeal pointless – issues such as whether this was a controlled tenancy or a licence, a termination by consent or a directive – it becomes so difficult to separate the issues to be considered on appeal, for the issues for grant of injunction as sought. I therefore decline to grant the orders sought and direct that the applicant urgently pursue the matter on appeal and to be given a hearing date for the appeal, on priority basis.

The application is dismissed with costs to respondent.

Delivered and dated this 22<sup>nd</sup> day of **February 2010** at Malindi.

**H. A. Omondi**

**JUDGE**