



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 710 of 2009**

**JACK & JILL SUPERMARKET.....APPELLANT**

**VERSUS**

**VIKTAR MAINA NGUNJIRI.....RESPONDENT**

**RULING**

1. By a notice of motion dated 18<sup>th</sup> December, 2009, Jack & Jill Supermarket Ltd, who is the appellant in this appeal, (hereinafter referred to as the applicant), seeks an order of temporary injunction restraining Viktar Maina Ngunjiri, (hereinafter referred to as the respondent), his agent or servant from demolishing premises known as LR No.209/869, (hereinafter referred to as the suit premises), or in any way interfering with the applicants occupation of the suit premises, pending the hearing and determination of the appeal.
2. The applicant further seeks an order of stay of execution and implementation of orders of Business Premises Rent Tribunal made on 15<sup>th</sup> day of December, 2009, in Business Premises Rent Tribunal No.719 of 2008 together with all consequential orders pending the hearing and determination of the appeal.
3. The application is anchored on grounds stated as follows:
  - (i) That the orders made on the 15<sup>th</sup> day of December, 2009 in BPRT No.791 of 2008 (consolidated with BPRT No.795 of 2008) affecting BPRT No.359 of 2009 are irregular and detrimental to the appellant/applicant as it was never heard hence the denial of Natural Justice.
  - (ii) That the appellant/applicant stands to suffer substantial loss and damages should execution be levied and the orders made on the 15<sup>th</sup> day of December, 2009 are implemented as the respondent intends to do, hence the need for a stay of execution and or implementation thereof.
  - (iii) That the appellant/applicant has a good appeal with overwhelming chances of success, and which shall be rendered nugatory in the event the irregular orders herein are implemented and the applicant evicted from the premises.
  - (iv) That it is just and equitable that the orders sought be granted so as to protect the integrity of the judicial process.
4. The orders of which the applicant is aggrieved were issued after the hearing of a notice of motion dated 8<sup>th</sup> June, 2009 which was filed by the applicant in BPRT No.791 of 2008. In the motion, the applicant sought to have the notice to terminate the tenancy dated 27<sup>th</sup> October, 2008 which was served upon him by the landlord struck out on the grounds that the same was an abuse of the Tribunal's due process. In the alternative the appellant moved the Tribunal to stay the reference which he had filed in the Tribunal, pending the hearing and determination of an appeal (Appeal No.570 of 2008), which the landlord/respondent had filed in the High Court.
5. The Tribunal Chairperson, having heard the application, issued orders as follows:
  - (i) The earlier order suspending rent be and is hereby lifted.
  - (ii) The earlier order prohibiting the Landlord from setting foot to the demised premises be and is hereby lifted; save that the Landlord is prohibited from setting foot to the area occupied by Jack and Jill Supermarket.
  - (iii) The Tenant to start paying rent immediately to his advocate for onward transmission to the Landlord's advocate.

(iv) Hearing on 22<sup>nd</sup> and 28<sup>th</sup> January, 2010.

6. The applicant has appealed against the ruling of the Tribunal and the orders delivered on 15<sup>th</sup> December, 2009. Tom Onyancha the managing director of the applicant, has sworn a supporting affidavit, in which he maintains that the order is irregular and that the appellant stands to suffer immeasurable loss and damages as a result of the irregular discharge of the orders. The applicant maintains that it has a meritorious appeal which will be rendered nugatory in the event that his tenancy will be irregularly and unprocedurally terminated. The applicant pleads that unless orders of stay of execution are granted it will be forcefully and illegally evicted from the suit premises.
7. Both parties have filed written submissions in respect of the application. For the applicant, it is submitted that the Chairman did not advance any grounds or reasons for making the adverse orders and that the applicant was not to blame for the delay in concluding the reference.
8. For the respondent it was submitted that the orders whose execution the applicant sought to stay were, the lifting of the respondent's restriction in setting foot on the demised premises, the lifting of the order in regard to paying of rent, and the failure by the tribunal to strike out the respondent's notice dated 27<sup>th</sup> October, 2008 to terminate the respondent's tenancy. It was noted that the Tribunal did not completely lift the respondent's restriction as it still barred from setting foot from areas occupied by the applicant. It was noted that there were still two orders restraining the respondent from interfering with the applicant's quiet enjoyment and possession of the lease premises. It was submitted that the applicant had only unproven allegations.
9. With regard to payment of rent, it was submitted that the Tribunal on its own motion, lifted the order suspending the rent payment. This was after various adjournments of the matter. It was contended that the respondent was suffering substantial loss as the applicant was the only sitting tenant in the premises, other tenants having vacated hence the need for rent payment.
10. With regard to the notice to terminate the tenancy dated 27<sup>th</sup> October, 2008, it was noted that the reference was filed by the applicant, and therefore the applicant cannot claim that it will suffer substantial loss if the notice is heard. It was further noted, that the hearing of the reference cannot in any way render the applicant's current appeal nugatory. It was argued that the applicant has not demonstrated an arguable appeal in relation to the orders it sought to appeal against.
11. Counsel for the respondent relied on the following authorities:
  - ***Narshidas & Company Ltd vs Nyali Air Conditioning & Refrigeration Services Ltd, Civil Appeal No.295 of 2005.***
  - ***Phase Industries Ltd vs Shaman Holdings Ltd & Others HCCC No.890 of 2001.***
12. The court was urged to consider the interest of both parties and not deny the applicant from enjoying the fruits of its judgment. It was argued that the respondent had produced documentary evidence showing that it has alternative premises and therefore did not require the applicant's premises to run a business. The court was urged that neither an order of stay of execution nor an order of injunction was appropriate in the circumstances.
13. I have given due consideration to this application. In their submissions the parties have somehow delved deeply into the merits of the appeal which is pending before this court. At this stage, that is not the mandate of this court, suffice to note that the applicant has filed a memorandum of appeal which raises several grounds the merit of which cannot be determined at this stage. At this stage, this court is only guided by the requirements of Order XLI Rule 4(2). Thus the court can only grant the orders sought in the following circumstances: -
  - (i) Where the court is satisfied that substantial loss will result to the applicant unless the order of stay of execution is issued, and
  - (ii) The application has been made without unreasonable delay, and
  - (iii) The applicant has provided or is ready to provide such security as the court may order for the due performance of the decree.
14. In this case, although the applicant claims that unless the orders sought are granted, the respondent may evict the applicant from the suit premises, it is clear that the order given by the Tribunal on 15<sup>th</sup> December, 2009, prohibited the respondent from setting foot to the area occupied by the applicant. Therefore, the Tribunal has somehow restrained the respondent from interfering with the applicant's premises. Therefore, the apprehension that the respondent may evict the applicant is unfounded.
15. As regards the order relating to rent, the applicant is still a tenant in the premises. There is no dispute regarding the rent to be paid. The dispute appears to be as to whether the termination notice should take effect. In the circumstances, the applicant cannot claim that it is suffering loss from the rent payment as it is enjoying quiet possession of the suit premises. In the light of the above,

I find no justification for this court issuing an order of temporary injunction or an order for stay of execution pending appeal. Accordingly, the application is dismissed. Costs in the appeal.

**Dated and delivered this 17<sup>th</sup> day of February, 2010**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Mwangi H/B for Omogeni for the applicant

Kilonzo for the respondent

Eric - Court clerk