



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 604 of 2008**

**MUHIA GACHUHI**

**T/A WESTLANDS CONNECTIONS LTD. ....APPELLANT**

**VERSUS**

**TROYKA LIMITED.....RESPONDENT**

**R U L I N G**

1. There are two applications before me. The first one is an application dated 9th December, 2008, filed by Troyka Limited who is the respondent in this appeal (hereinafter referred to as the respondent for ease of reference). The second application is one dated 6th February, 2009, filed by Muhia Gachuhi t/a Westlands Connections Ltd. who is the appellant in this appeal (hereinafter referred to as the appellant).

2. The respondent's application is a notice of motion seeking review of the orders made by this court on 1<sup>st</sup> December, 2008 under Order XLIV Rule 1, Order XXXIX of the Civil Procedure Rules, and Sections 3A and 63(e) of the Civil Procedure Act. The respondent's application is anchored on grounds which have been stated on the body of the motion. It is also supported by an affidavit sworn by Patrick Muhia Gachugu, who is the property manager of the respondent company.

3. The appellant's application is brought under Section 5(1) of the Judicature Act Cap 8 of the Laws of Kenya, Order 52 Rule 2(2) of the Rules of the Supreme Court of England 1965, and Section 3A of the Civil Procedure Act. The appellant seeks an order that Trevor Irungu Kanja, the managing director of the respondent show cause why an order for committal should not be made against him for disobeying the order of the court which was made on 1<sup>st</sup> December, 2008. The appellant's application is supported by grounds which have been stated on the face of the motion. It is also supported by a statement of facts and a verifying affidavit sworn by Muhia Gachuhi, filed under Order 52 Rule 2 of the Rules of the Supreme Court of England.

4. The background to the two applications is as follows: The appellant has been a tenant to the respondent in premises known as Jameson Court Ngong Road apartment No.6. By a notice of termination of tenancy dated 28<sup>th</sup> November, 2007, the respondent served the appellant with a notice under Section 4(2) of the Landlord and Tenant (Shops Hotels and Catering Establishments) Act, seeking to terminate the tenancy with effect from 1<sup>st</sup> February, 2008. That notice was subject of a reference before the Business Premises Rent Tribunal in Business Premises Rent Tribunal Case No.807/2007. On 9<sup>th</sup> September, 2008. The Tribunal through its Chair allowed the respondent's notice and ordered the appellant to vacate the premises on 1<sup>st</sup> December, 2008.

5. The appellant moved to this court on 17<sup>th</sup> November, 2008 and filed a memorandum of appeal against the orders made by the Business Premises Rent Tribunal on 9<sup>th</sup> September, 2008. On 25<sup>th</sup> November, 2008, the appellant moved this court under Section 3A of the Civil Procedure Act, Order XLI Rule 4, and Order L Rule 1 of the Civil Procedure Rules, for orders that the order made by the Chairman of the Business Premises Rent Tribunal on 9<sup>th</sup> September, 2008 be stayed pending the hearing and determination of the appeal. The appellant also sought to be allowed

to access and use the suit premises as a protected tenant pending the hearing and determination of the “suit”.

6. The appellant appeared before Visram J. on 26<sup>th</sup> November, 2008. His application was certified as urgent and ordered to be served and heard on 28<sup>th</sup> November, 2008. On 28<sup>th</sup> November parties appeared before Hon. Sitati J. The matter could not go on as it was designated for hearing before me but I was not sitting. Parties agreed by consent to have the respondent file and serve his replying affidavit, and the application dated 25<sup>th</sup> November, 2008, heard before me on 1<sup>st</sup> December, 2008.

7. On the 1<sup>st</sup> December, 2008, the matter was not listed before me. Therefore, on the same day, the appellant filed an application under certificate of urgency vide a chamber summons dated 1<sup>st</sup> December, 2008 in which he sought *inter alia*, to have the application certified as urgent and service dispensed with in the first instance. Secondly orders of mandatory injunction compelling the respondent to open up the suit premises to allow the appellant to continue with its tenancy, pending the hearing and determination of the application dated 25<sup>th</sup> November, 2008. Further, the appellant sought a mandatory injunction compelling the respondent to return all the doors, fixtures and fittings in the suit premises pending further orders of the court.

8. The appellant’s counsel appeared before Visram J. who was the duty judge and the application was stood over to 2.30 p.m. At 2.30 p.m. on the same day, both parties appeared before me and counsel for the appellant argued the application dated 1<sup>st</sup> December, 2008. The court certified the matter as urgent and noted that the eviction of the appellant from the suit premises would compromise the appeal and the pending application for stay of execution.

9. The court further noted that the circumstances in which the appellant was evicted from the suit premises were questionable as there was no order for eviction or distress for rent which had been exhibited. Nor was the issue of rent arrears raised before the Tribunal. Thus the court decided to restore the *status quo* to enable the court determine the application dated 26<sup>th</sup> November, 2008 without prejudice to either party. Accordingly the court granted the mandatory injunctions sought by the appellant.

10. On the 9<sup>th</sup> December, 2008, the respondent filed his current application seeking to have the orders made on 1<sup>st</sup> December, 2008 reviewed and set aside as aforesaid. That application was certified as urgent but did not proceed to hearing although it came up before the court on two occasions. In the meantime, the appellant obtained leave to apply for the respondent’s managing director to be brought before this court to show cause as to why he should not be committed to Civil Jail for disobeying the court order issued on 1<sup>st</sup> December, 2008.

11. It was thereafter that the appellant filed his application dated 6<sup>th</sup> February, 2009 seeking to have Trevor Irungu Kanja show cause why an order for committal should not be made against him. Both applications remained in abeyance for a while as efforts were made towards settlement. No settlement was however reached. On 28<sup>th</sup> October, 2009, the parties agreed to exchange and file written submissions with regard to the applications dated 9<sup>th</sup> December, 2008 and 6<sup>th</sup> February, 2009 to enable this court determine the two applications.

12. The respondent urged the court to review and or set aside the orders made on 1<sup>st</sup> December, 2008 under Order XLIV Rule 1 and Order XXXIX Rule 4 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act on the following grounds:

(i) That the application was brought under the wrong provisions of law. i.e. Orders XXXIX Rule 1 and 2 of the Civil Procedure Act, under which the court had no jurisdiction to grant mandatory injunctions.

(ii) That there was no substantive suit on which interlocutory injunctive relief could be sought. It was argued that the appellant ought to have filed a substantive suit seeking permanent injunctive relief, upon which the interlocutory injunctive relief could be anchored. In this regard ***Dismus Oduor Owuor vs Housing Finance Company (K) Ltd and another HCCC. No.630 of 2001*** was relied upon.

(iii) That this court being a court of first instance lacked the jurisdiction to hear the appellant’s application for a mandatory relief. It was argued that the disputed basis of the appellant’s application being the violation of the terms of the order issued by the Business Premises Rent Tribunal issued on 21<sup>st</sup> October, 2008, constituted a fresh cause of action upon which the appellant was entitled to seek both injunctive relief and damages. The applicant therefore ought to have

filed a fresh suit.

(iv) That the application was defective as it ought to have been instituted by way of a notice of motion and not a chamber summons.

(v) That the appellant's application and orders obtained were final in nature and did not provide any opportunity for the respondent to challenge the orders. It was contended that the appellant's application leading to the orders of 1<sup>st</sup> December, 2008, was fatally defective as they were not seeking interlocutory or temporary relief as provided under Order XXXIX of the Civil Procedure Rules.

13. In addition to the above grounds, it was further submitted that the respondent was denied an opportunity of presenting its own version of relevant facts as the respondent's counsel was only served a few minutes before the application was heard. It was contended that had the respondent been given sufficient time, it could have brought the following to the attention of the court.

(i) That the appellant's appeal was filed out of time without leave of the court. Therefore the application for mandatory injunction based on an incompetent appeal ought to have been dismissed.

(ii) That the appellant did not come to this court with clean hands and was undeserving of any equitable relief. This is because the appellant refused to pay rent for the month of October and November, 2008 and frustrated the respondent's attempt to levy distress by violently resisting and forcefully removing his goods from the suit premises.

(iii) That pursuant to the order of the Tribunal, the appellant was to vacate the suit premises by 1<sup>st</sup> December, 2008 and by that date, the respondent had not been served with any court order, staying or reversing the order of the Tribunal. Thus the respondent was entitled to take possession of the suit premises, the appellant having ferried his goods away from the suit premises to avoid the threatened distress.

(iv) That the appellant was guilty of inordinate delay in bringing his application for stay of execution.

(v) That the order of 1<sup>st</sup> December, 2008 was incapable of immediate compliance given the state of the suit premises, the fixtures and fittings not being in place and the respondent needing time to restore the fixtures and fittings.

14. It was contended that the balance of convenience was in favour of the respondent who needed to carry out the extensive repairs and renovations to the suit premises which were in a deplorable state, as opposed to the appellant who was not coming to court with clean hands. It was further contended that the appellant could be adequately compensated by an award of damages.

15. The appellant on his part urged the court to dismiss the respondent's application. The appellant pointed out that the notice to vacate the suit premises was to expire on 1<sup>st</sup> December, 2008 and that the respondent forcefully evicted the appellant from the suit premises on the same day in the morning before the notice expired. Thus the respondent's action was illegal and the injunction granted by the court on 1<sup>st</sup> December, 2008 proper. The court was urged to find that the respondent should not be given a hearing, because it had deliberately disobeyed the court orders. It was contended that the respondent had not demonstrated that there was anything new which was not within its knowledge at the time the

orders of 1<sup>st</sup> December, 2008 were given to justify review. It was pointed out that the grounds upon which the respondent was seeking to have the order of 1<sup>st</sup> December, 2008 reviewed or set aside, such as the respondent not having been heard, application being fatally defective etc, were not grounds for review, but were grounds which go to the merit of the decision of the court, and therefore the respondent ought to have come by way of an appeal and not by way of review.

16. The appellant further maintained that his application was properly before the court under the right provisions of the law, and also that the respondent was given a proper hearing. It was noted that the respondent had admitted taking possession of the suit premises, and on the same day, purported to have destroyed it such that it was inhabitable. The court was urged to find that the respondent's action was an act of impunity which must be punished. Counsel for the appellant referred to several High Court decisions in which orders of mandatory injunction were given, for his submission that such an order can be issued under Order XXXIX of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

17. I have given due consideration to the respondent's motion. I do note that this court is seized with appellate jurisdiction in respect of the appellant's appeal against the orders made by the Business Premises Rent Tribunal on the 9<sup>th</sup> September, 2008, allowing the notice issued by the respondent, to terminate the appellant's tenancy in the suit premises, to take effect, and the appellant to vacate the premises on 1<sup>st</sup> December, 2008. Under Order XLI Rule 4 of the Civil Procedure Rules, this court as an appellate court has jurisdiction to stay the orders subject of the appeal, which were issued by the lower court, pending the hearing of the appeal.

18. Under Order XLI Rule 4(6) of the Civil Procedure Rules, the powers of this court extend to issuing temporary injunctive orders. The application dated 1<sup>st</sup> December, 2008 was brought under Order XXXIX Rule 1 and 2 of the Civil Procedure Rules. The respondent did not therefore invoke this court's appellate jurisdiction under Order XLI Rule 4(2) and (6), nor did the respondent invoke the court's inherent jurisdiction as restated under Section 3A of the Civil Procedure Act. Therefore to that extent, the chamber summons dated 1<sup>st</sup> December, 2008 was improperly before this court.

19. Secondly, it is evident that the respondent was served with the appellant's application just a few hours before the application was heard. Therefore the respondent had no opportunity to put in any reply to the appellant's application dated 1<sup>st</sup> December, 2008. That does not mean that the respondent was not given a hearing as the respondent's counsel was heard. Nonetheless, the court did not have the benefit of having all facts placed before it, before making the order of 1<sup>st</sup> December, 2008.

20. Having now had the benefit of the affidavit sworn by the respondent's marketing manager, it is apparent that the respondent took possession of the suit premises on 1<sup>st</sup> December, 2008. It is also evident that by the time the appellant came to court, the suit premises had already been interfered with, to the extent of the doors, fixtures and fittings being removed, thus making compliance with the court order of 1<sup>st</sup> December, 2008 difficult. Restoring the status quo prior to 1<sup>st</sup> December, 2008 was thus next to impossible.

21. Under Order XLIV Rule 1 of the Civil Procedure Rules, the court can only review a decree or order where there is discovery of new and important matter which after the exercise of due diligence was not within the knowledge of the applicant or on account of some mistake or error apparent on the face of record or for some other sufficient reason. I find that in the circumstances of this case, there is sufficient reason to justify the setting aside of the order of 1<sup>st</sup> December, 2008.

22. Moreover, the orders of mandatory injunction which were granted on the 1<sup>st</sup> December, 2008 were granted under Order XXXIX of the Civil Procedure Rules. Under Order XXXIX Rule 4 of the Civil Procedure Rules, the court has powers to discharge and vary or set aside any order of injunction made under Order XXXIX on the application of any party dissatisfied with such an order. In the instant case, the respondent has satisfied this court that it is fair and just to set aside the order orders issued on 1<sup>st</sup> December, 2008.

23. It would appear that the respondent's action of taking possession of the suit premises on the 1<sup>st</sup> December, 2008 was questionable given the fact that the appellant had until the end of that day to comply with the orders of the Business Premises Rent Tribunal. Nevertheless, the appellant can only now pursue his redress in a civil action for damages.

24. For the above reasons, I would allow the respondent's application dated 9<sup>th</sup> December, 2008 and issue orders as prayed. Having disposed off the respondent's application in the respondent's favour, and the appellant's application dated 6<sup>th</sup> February, 2009, being anchored on orders which I have set aside, the application dated 6<sup>th</sup> February, 2009, is

overtaken by events and cannot stand. It is accordingly dismissed. In the circumstances of this case, I make no orders as to costs in respect of both applications.

**Dated and delivered this 25<sup>th</sup> day of March, 2010**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Mr. Simani for the appellant

Mr. Gachanja for the respondent

Eric - Court clerk