



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Appeal 141 of 2009

(Appeal from a Ruling and Order of the lower court (M.O. Kizito, SRM) in SRMCCC No. 1010 of 2009 at Mombasa)

**POSTAL CORPORATION OF KENYA
METROCOSMO LIMITEDAPPELLANTS
VERSUS
JOHN MUSYOKAKIVUNZIRESPONDENT**

RULING

This is an application primarily under Order XLI rule 4 of the Civil Procedure Rules. It seeks one substantive order that there be a stay of execution of the order issued by the Resident Magistrate, Hon. M. O. Kizito on 21st July, 2009 in SRMCC No. 1010 of 2009, pending the hearing and determination of this appeal. The applicants are the defendants in the lower court whilst the respondent is the plaintiff. The main grounds for the application are that unless the stay is granted the applicants' appeal shall be rendered nugatory even if it were to eventually succeed; that unless there is stay the applicants shall suffer substantial loss because compliance with the lower court's order will result in the eviction of a party who has not been joined in these proceedings and that the applicants are ready and willing to abide by any condition or order regarding security. There is an affidavit in support of the application sworn by one Lawrence Karere Magambo, the 1st applicant's Regional Manager. To the affidavit, a copy of the handwritten ruling of the lower court has been annexed. The averments in the affidavit are an elaboration of the above grounds.

The respondent opposes the application and has filed a replying affidavit. It is deponed in the affidavit, *inter alia*, that the applicants are in contempt of court and are undeserving of the exercise of discretion in their favour; that the applicants are urging the case of a third party and that the application is incompetent because an extract of the order sought to be stayed has not been exhibited and one of the applicants has not filed a supporting affidavit.

When the application came up for hearing on 15th March, 2010, counsel agreed to file written submissions which they duly filed by 19th April, 2010. For the applicants, it is submitted that the stay sought is necessary to pre-empt the very purpose of the appeal filed by the applicants who contend that by the time the lower court granted the injunction said to have been disobeyed, the respondent had already been evicted and the suit property leased to another party who has not been joined in these proceedings. In the premises, the order given by the lower court could not be complied with without involving a party against whom no order had been made. It is further submitted, on behalf of the applicants, that the eviction was infact carried out by a disclosed independent contractor who is also not a party to these proceedings. In

those premises, the applicants contend that contempt proceedings could not lie against them.

The respondent in response contended that the applicants indeed disobeyed an order of the court and are still in contempt of the same order thereby impeding the cause of justice. In the respondent's view, the fact that a third party is involved does not affect the effect of the order issued by the lower court. The respondent further contends that the requirements of order XLI Rule 4 of the Civil Procedure Rules have not been satisfied and that the conduct of the applicants is not deserving of the order of stay.

I have carefully considered the application, the affidavits filed by both parties, the annexures to the said affidavits, the submissions by both counsel and the cases cited. Having done so, I take the following view of the matter. For the applicants to succeed in this application, they had to satisfy the conditions set in Order XLI Rule 4 of the Civil Procedure Rules. Under the rule, I am required to consider first whether there is sufficient cause to warrant stay of execution and the court cannot issue the order unless:-

- (a) I am satisfied that substantial loss may result to the applicants unless the order is made and that the application has been made without inordinate delay and;**
- (b) Such security as I may order for the due performance of such decree or order as may ultimately be binding on the applicants has been given by the applicants.**

To show sufficient cause the applicants have argued that their appeal will be rendered nugatory even if it were to eventually succeed unless the order of stay of execution is granted. They have further argued that a third party is involved who has not been joined and for them to comply with the lower court's order, an eviction of the said 3rd party will have to be carried out. That event will, according to the applicants open them to a suit for breach of contract which contract existed even before the order of injunction was issued.

If I understand the applicants correctly and I think I do, their position is that they did not disobey the lower court's order and therefore they committed no contempt, so if they comply with an order they did not disobey before their appeal is heard, then success of their appeal will be of no use to them. In my view, that is a powerful argument in favour of an order of stay. It is in the appeal that the contention that there was indeed no contempt committed and that the injunction was issued after the respondent had been evicted will be determined. The appeal will also consider issues such as whether the applicants have been condemned for acts of an independent contractor and whether the order of the lower court applied to the third party. In the premises, I am satisfied that there is sufficient cause to order stay of the order appealed against.

I am also satisfied that substantial loss may result to the applicants unless the order of stay is made. I say so, because unless stay is ordered, the applicants will be deemed to be in contempt of the order requiring the reinstatement of the respondent even before their appeal is heard which disobedience may very well attract further sanctions against them. Besides, the rights of a third party are now involved and cannot be wished away before the appeal is heard.

With regard to delay, I note that the order appealed against was made on 21st July, 2009 and the appeal was lodged on 29th July, 2009. The applicants applied for stay to the lower court which application was dismissed on 15th December, 2009. This application was then lodged on 18th December, 2009. In the premises the applicants are not guilty of delay at all.

The last condition to satisfy before a stay can be granted is that of security. The applicants have deponed that they are ready and willing to abide by any condition or order of security as may be made for the due performance of the order sought to be stayed. The order appealed against is not a money decree or order. If the appeal fails, the respondent will be reinstated to the suit premises and will probably have incurred expense in obtaining alternative accommodation. In the premises, the applicants shall file separate undertakings to compensate the respondent for any loss he will have incurred in the interim. Such undertakings to be under seal and should be filed within the next 7 days from the date hereof.

With regard to the submission that this application is incompetent for failure to exhibit an extract of the order sought to be stayed, I observe that the respondent does not suggest that the said order was not in fact made. He has not demonstrated in any event that the failure to to so exhibit has caused him prejudice. In my view the failure to annex the order sought to be stayed is not fatal to the application. It is significant that the decision of Gacheche J, in **Eldoret HCCC No. 123 of 1991 (UR)** upon which the respondent sought to rely for the proposition that an extract of the order sought to be stayed should have been exhibited, involved a consideration of an application under both Order XLI and Order XLIV of the Civil Procedure Rules. It is only under the latter that an extract of the order is crucial.

In the end the application dated 18th December, 2009 is allowed as prayed in paragraph 3 on the condition stated above.

Costs of this application shall be in the appeal. It is so ordered.

DATED AND DELIVERED AT

MOMBASA THIS 19TH DAY OF MAY 2010.

F. AZANGALALA

JUDGE