



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL SUIT 322 OF 2008

OSKA DAVID ODHIAMBO.....PLAINTIFF
-VERSUS-
1. JORDAN INVESTMENTS LIMITED.....1ST DEFENDANT
2. MUNIRA CHIDZUGA BENNETT.....2ND DEFENDANT

RULING

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There is a plurality of interlocutory applications on this file. On 17th December, 2009 I directed that two of them would be dealt with simultaneously: 2nd defendant's Notice of Motion of 3rd August, 2009; and plaintiff's Notice of Motion of 7th September, 2009.

The 2nd defendant's Notice of Motion of 3rd August, 2009 is brought under Order XLI, rule 4 of the Civil Procedure Rules, and s. 3A of the Civil Procedure Act (Cap. 21, Laws of Kenya).

The relevant prayers are thus set out:

"3. This Honourable Court be pleased to stay its order and ruling of 26th June, 2009 and instead maintain the *status quo*, so as to avoid a situation where 2nd defendant will enter upon and take possession of the suit premises known as Plot No. 1356 Diani Beach Road, until the hearing and determination of an intended appeal, on grounds that:

- 2nd defendant filed a notice of appeal and applied for proceedings, ruling and order;
- the order of injunction is being construed as a trespass charter which will lead to an invasion of the suit property;
- the plaintiff is no longer a tenant of the 2nd defendant;
- 2nd defendant will suffer irreparable loss if stay is not granted;
- the plaintiff owes 2nd defendant substantial arrears of rent.

"4. In the interim, this Court be pleased to order a temporary stay of the ruling and order made on 26th June, 2009 and order the maintenance of the *status quo* so as to prevent invasion of the suit property pending *inter partes* hearing of this application.

"5. In the meantime, further proceedings in this case be stayed."

Evidence in support of the application is set out in the affidavit of *Munira Chidzuga Bennett* sworn on 3rd August, 2009.

The plaintiff's Notice of Motion of 7th September, 2009 is brought under Order L, rule 17 of the Civil Procedure Rules, and s. 3A of the Civil Procedure Act. This second application relates to the first one, and carries the following substantive prayers:

"1. That, the *ex parte* leave and order granted to the defendants on 4th August, 2009 to apply for an order of temporary stay, and interim order of stay in this case, be set aside, and the order for stay issued on the same day be discharged.

"2. That, the Notice of Motion dated 3rd August, 2009 filed by [2nd defendant] be dismissed with costs".

This application is supported by the plaintiff's affidavit sworn on 7th September, 2009 and by the supplementary affidavit by the same deponent, of 10th September, 2009. But those depositions are contested in 2nd defendant's replying affidavit, dated 28th September, 2009, which is followed by the plaintiff's further supplementary affidavit of 5th October, 2009, and by 2nd defendant's further affidavit of 15th April, 2010.

The ruling of the Court (*Sergon, J*) in reference, of 26th June, 2009 was in favour of the plaintiff, and against 2nd defendant. The plaintiff holds a lease of premises standing on Plot No. 1356 Diani Beach Road (which belongs to 2nd defendant) – and this lease is expressed to last up to 31st August, 2013; and his complaint is that 2nd defendant is making changes to the premises which are inconsistent with his leasehold rights.

Following the delivery of the ruling of 26th June, 2009 2nd defendant has secured certain orders *ex parte*, notably the third order of 4th August, 2009, to this effect:

"That a temporary order of stay of the ruling and order made by this Court on 26th June, 2009 be and is hereby issued and the *status quo* existing be maintained pending the hearing of the application [of 3rd August, 2009] *inter partes*."

Learned counsel **Ms. Shariff**, for 2nd defendant began her submissions by setting out a chronology of events in the run-up to the judicial proceedings in this matter: there was a lease agreement of **2nd September, 2008** between the plaintiff and 2nd defendant, in respect of an entertainment club, by name “Club Willow”, standing on Plot No. 1356, Diani Beach Road. The plaintiff was at the time working in partnership with one **Krijnie Schoon**. On **8th November, 2008** the said **Krijnie Schoon** wrote a letter to 2nd defendant terminating the lease; and subsequently, the plaintiff who was running the club, defaulted in rent payment, necessitating issuance of a notice of termination of tenancy, addressed to the plaintiff and his partner, by 2nd defendant – and this notice was given by virtue of s.4 (2) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap. 301, Laws of Kenya). The notice was duly acknowledged by **Krijnie Schoon** though not by the plaintiff. Then on **12th November, 2008** the plaintiff filed suit, and also filed a Chamber Summons application seeking injunctive orders – and his application was allowed in the said ruling of **26th June, 2009**.

Counsel urged that 2nd defendant’s notice of termination took effect on **1st February, 2009**: for no reference had been filed. The 2nd defendant proceeded to take possession of the demised premises; and by that time the rent arrears stood at Kshs. 480,000/=.

Counsel submitted that the plaintiff’s injunction application had been overtaken by events; and by the time the ruling was delivered on **26th June, 2009**, the lease had long been terminated.

Counsel urged that the plaintiff’s advocate, on the occasion of the said ruling, had obtained certain orders purely by default; for the reason that 2nd defendant’s counsel was not notified of the ruling date and so was absent; and that counsel for the plaintiff did not submit drafts of those orders to 2nd defendant’s counsel. Being aggrieved about orders thus extracted by the plaintiff’s counsel, 2nd defendant filed before the High Court an application for stay of execution pending appeal. The appeal was eventually lodged, being Civil Appeal No. 13 of 2010, **Munira Chidzuga Bennett v. Oscar David Odhiambo**.

Counsel submitted that, as of today, there is no landlord-tenant relationship between the plaintiff and 2nd defendant.

Learned counsel urged that 2nd defendant’s application for stay pending appeal is a meritorious one: because the appeal itself will be rendered nugatory if stay of execution is not ordered, and “she would suffer irreparably as the plaintiff would [invade] 2nd defendant’s premises [even] though the injunctive orders granted were restrictive and not mandatory, and none were ever served upon 2nd defendant [or] her advocates on record”.

Counsel urged that the plaintiff’s application be dismissed, while the defendant’s application be allowed.

Mr. Hayanga, learned counsel for the plaintiff, analysed the issues in the two applications as falling under four heads, namely:

- (i) **whether the Court should order a stay of the ruling and order of 26th June, 2009;**
- (ii) **whether there should be a stay of further proceedings in the case;**
- (iii) **whether the Court should discharge and set aside the order of stay obtained by 2nd defendant ex parte on 4th August, 2009 and dismiss 2nd defendant’s Notice of Motion dated 3rd August, 2009;**
- (iv) **what orders should be made as to costs.**

Referring to the history of the case, learned counsel noted that the plaintiff had filed suit on **12th November, 2008** seeking: a prohibitory injunction; a declaration; compensation for loss of business. The plaintiff at the same time sought an interlocutory injunction (Chamber Summons of **11th November, 2008**): and the Court began by granting a temporary injunction – restraining the defendant from entering upon or interfering with the plaintiff’s tenancy on Plot No. 1356, Diani Beach Road; and this order was extended pending hearing and determination of the application; in the end, the ruling of **26th June, 2009** came, allowing the Chamber Summons of **11th November, 2008**. The Court issued a temporary injunction restraining the defendants from interfering with the plaintiff’s quiet possession and enjoyment of the suit premises, or interfering with the plaintiff’s tenancy rights pending the hearing and determination of the suit. The Court ordered the defendants to remove the barrier at the entrance obstructing the plaintiff in accessing the suit premises for the purpose of loading and off-loading.

Contrary to the contentions of 2nd defendant’s counsel, **Mr. Hayanga** submitted that the plaintiff had extracted from the Court’s ruling of **26th June, 2009**, orders, on **20th July, 2009**; and the same was served upon 2nd defendant on **23rd July, 2009**. Counsel submitted that 2nd defendant had first disobeyed the order in the ruling of **26th June, 2009** and then proceeded to file her own application, by Notice of Motion of **3rd August, 2009** – seeking an order of stay on the ruling and orders of **26th June, 2009**; seeking maintenance of the *status quo*, until the hearing and determination of an intended appeal; and seeking stay of all further proceedings.

Counsel urged that 2nd defendant’s Notice of Motion of **3rd August, 2009** amounted to an abuse of the process of the Court.

Learned counsel doubted whether 2nd defendant had properly lodged an appeal, so that on this basis, stay of execution pending appeal may be sought: but it has now been represented to this Court that there is indeed an appeal, Civil Appeal No. 13 of 2010.

Counsel doubted whether, taking all things into account, 2nd defendant falls within the terms of Order XLI, rule 4 (2) for grant of stay of execution pending appeal. The relevant provision is that:

“No order for stay of execution shall be made under sub-rule (1) unless –

(a) the Court is satisfied that substantial loss may result to the applicant unless the order is made; and

(b) Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant”.

Counsel urged that 2nd defendant had not satisfied the conditions for issuance of an order of stay, as provided under Order XLI, rule 4 of the Civil Procedure Rules: 2nd defendant had not given evidence showing that she would suffer substantial loss, or any loss at all, unless an order of stay of execution is issued; and 2nd defendant had not shown the willingness to give any security.

By contrast, counsel urged, the Plaintiff’s position was clear from the ruling of **26th June, 2009**; in the words of the Court in that case:

“The second principle is that an applicant must show that he would suffer irreparable loss. It is apparent from the averments of the plaintiff and the 2nd defendant that the plaintiff’s business is likely to grind to a halt if the activities complained of are not stopped. It is difficult to ascertain in monetary terms the amount of losses in respect of property.... I am satisfied that the plaintiff has shown that he is likely to suffer substantial loss unless the order is granted.”

Mr. Hayanga urged that 2nd defendant’s application be refused, because her object was apparently to defeat the terms of the ruling and order of the Court, of **26th June, 2009**.

Counsel urged that it was wrong for 2nd defendant to seek a maintenance of the status quo: for that **status quo** covered 2nd defendant acting in breach of the orders of injunction of **26th June, 2009**.

Counsel submitted that the Court would not act in vain; and yet 2nd defendant who has disobeyed the Court orders of **26th June, 2009** “cannot now come to Court with such dirty hands, either to have the same order stayed, or to maintain the **status quo** – a continuous breach of the orders of the Court.....”

Counsel submitted that 2nd defendant was aware of the orders of the Court (and she annexes these to her affidavit), but chose to disobey them: by entering upon the suit premises and starting a business. Counsel urged that 2nd defendant should not complain of any loss or damage, but should “purge her disobedience by first complying with the orders of the Court”.

Counsel submitted that it was not true, as claimed by 2nd defendant, that the plaintiff’s tenancy had terminated on **1st February, 2009**: although 2nd defendant purports to have terminated the tenancy by her notice of **10th November, 2008**, it is clear from the mark on the notice itself, that service was effected only upon one **Krijnie Schoon**. Thus, it was urged “2nd defendant cannot purport to have terminated the tenancy of the plaintiff ..., without service or evidence of service of the said notice upon him, and when there was in existence a Court order barring 2nd defendant from interfering with the plaintiff’s quiet possession....”

Counsel submitted that 2nd defendant’s contention that the plaintiff was not her tenant was contradictory, since she was at the same time claiming rent arrears from the plaintiff.

Learned counsel urged the significance of judicial discretion in the grant of stay of execution pending appeal, and in this regard, called in aid several judicial decisions: **Burka Ahmed Sagim & Another v. Stephen C. Ngala**, Mombasa H.C. Civ. Appeal No. 58 of 1998 (**Etyang, J.**); **Fredrick Egunza v. Marshalls (E.A.) Limited**, Nairobi MCC Civil Case No. 1964 of 1999 (**Onyango Otieno, J.**); **Mpaka Road Development Co. Ltd. v. Abdulgafur Kana t/a Anil Kapuripan Coffee House**, Nairobi MCC Civil Suit No. 318 of 2000 (**Ringera, J.**).

The two applications are like the two sides of a coin, and they naturally fall for determination together. The reference-point in both applications is the Court’s ruling of **26th June, 2009**; but it is not permissible to go into the merits of that ruling, on grounds of jurisdiction.

The learned Judge, on the occasion of delivering the ruling of **26th June, 2009** recorded that due notice of this date had been given; and it was thus the duty of the counsel with the conduct of the matter to attend Court. It has to be inferred, therefore, that both parties were aware of the content of the ruling, and of the orders made. Those orders, so far as is material, were as follows:

“2. THAT a temporary injunction is issued against the defendants herein by themselves or anybody claiming through them or their servants, agents or any other person whomsoever and whatsoever from interfering with the plaintiff’s quiet

possession and enjoyment of the suit premises, i.e. Plot No. 1356 Diani Beach Road or from interfering with the plaintiff's tenancy rights thereof pending [the] hearing and determination of this suit.

“3. THAT the defendants do remove forthwith the barrier [at] the entrance barring the plaintiff from accessing the suit premises for purposes of offloading and loading stock for the bar and kitchen.”

These orders, I hold, supersede the contractual situation canvassed for 2nd defendant: that she had given the plaintiff a notice of termination of the lease agreement which had taken effect on **1st February, 2009**. Therefore, the plaintiff's tenancy was to remain protected by law until the suit herein was heard and determined.

Secondly, although 2nd defendant claims that she had given the said notice to the plaintiff, the evidence on record shows that she only gave that notice to one **Krijnie Schoon**, but not to the plaintiff herein; and therefore, the said notice cannot be the basis for contesting the plaintiff's tenancy at the suit premises.

Clearly then, the legality of the plaintiff's occupancy of the suit premises, subject to the forthcoming hearing of the suit, has been determined with finality at the High Court level, and it is not to be questioned at this stage. Accordingly, prayer No. 3 of 2nd defendant's Notice of Motion of **3rd August, 2009** must be refused.

For that same reason, that the plaintiff's position at the suit premises is secured by valid Court orders which I cannot question, prayer No. 4 of 2nd defendant's Notice of Motion of **3rd August, 2009** is refused.

There is, in my view, no basis for prayer No. 5 of 2nd defendant's said application of **3rd August, 2009**; and consequently it is refused.

Once the substratum of 2nd defendant's application is thus refused, it follows that the first prayer in the plaintiff's Notice of **7th September, 2009** is to be allowed, since the interim orders granted *ex parte* on 4th August, 2009 would otherwise be standing in contradiction to orders arrived at after *inter partes* hearing.

The plaintiff's second prayer in the Notice of Motion of 7th September, 2009 is in every respect consistent with this Court's view of the correct decision in relation to 2nd defendant's main prayers in her Notice of Motion of **3rd August, 2009**.

The record shows that prior to the ruling and orders of the Court made on 26th June, 2009, a temporary injunction had been issued on **13th November, 2008** “restraining the defendants/respondents by themselves, their servants, agents or any other person claiming under them whomsoever or whatsoever from access to, entering upon, or interfering with the plaintiff's/applicant's tenancy and business interests in all that plot known as Plot No. 1356 Diani Beach Road”. It means that this Court, from the very beginning, has seen it fit and proper to confer the protection of the law upon the plaintiff, on the basis of the *prima facie* case: and such a position precludes the contract-based claims which 2nd defendant has been raising, at this preliminary stage. If, in spite of the consistent stand of this Court, any different *status quo* has come to exist at the *locus in quo*, it would be contrary to law, and therefore, 2nd defendant's prayer No. 3 in her Notice of Motion of **3rd August, 2009** must be refused.

In this context, there is no basis for the exercise of the discretion to grant stay of execution of the Court's Orders pending appeal, and, if such appeal is one of merit, then, at this stage, 2nd defendant must look to it exclusively as the basis of any favourable orders such as might be realized in the end.

I dismiss 2nd defendant's Notice of Motion application of **3rd August, 2009** with costs to the plaintiff; and I allow the plaintiff's Notice of Motion application of 7th September, 2009; 2nd defendant to bear the costs.

Orders accordingly.

DATED and DELIVERED at MOMBASA this 11th day of June, 2010.

.....
J. B. OJWANG
JUDGE

Coram: *Ojwang, J.*

Court Clerk: *Ibrahim*

For the Plaintiff: *Mr. Hayanga*

For the 2nd Defendant: *Ms. Shariff*