



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
(Coram: Ojwang, J.)
CIVIL APPEAL NO. 115 OF 2010

MARY SYVUTHA PETERAPPELLANT /APPLICANT

- VERSUS -

1. ABDULRAHMAN KASSIM JAFFER

2. ABDULRAZAK UMAR HAJI HUSSEINRESPONDENTS

3. MARIAM KASSIM SAID

RULING

The appellant/applicant moved the Court by Notice of Motion filed on **14th June, 2010** and brought under Orders **XLI** (rule 4(1), (2)), **XLII** (rule 1(1)), **L** (rule 1) and ss.3A and 63, Civil procedure Act (Cap 21, Laws of Kenya). The application has one substantive prayer outstanding:

“That this Court be pleased to issue an order of stay of execution of the orders of the Chief Magistrate, Mombasa made on 27th May, 2010 in SRMCC No. 1019 of 2006, ordering monies deposited in Court as security to be released to the respondents and dismissing the entire suit, pending the hearing and determination of the appeal filed herein”

The application is founded on certain grounds which may be summarized as follows:

- (i) the appellant had filed a suit in the lower Court against the respondents, this being Mombasa SRMCC NO. 1019 of 2006, seeking, inter alia, orders of specific performance;***
- (ii) after filing the said suit, the appellant filed an application to stop the respondents from levying the distress against the appellant’s properties to recover alleged rent arrears in respects of a godown on Plot No. Mombasa/Block XIX/315 where the appellant was then a tenant paying a monthly rent of Kshs.45,000/=;***
- (iii) the said application was disposed of by consent dated 31st October, 2006, by which all outstanding rent arrears and future rent was ordered to be deposited in Court till the suit was heard and determined ? and, to-date, the appellant has duly complied;***

(iv) in October, 2009 the respondents attempted to levy distress against the appellant's properties, even though the appellant had not defaulted in paying the deposits; and this caused the appellant to file an application dated 13th October, 2009 which was heard on 12th November, 2009, with the ruling being delivered on 27th May, 2010.

(v) In the said ruling of 27th May, 2010, the learned Chief Magistrate dismissed the entire suit without taking evidence, and ordered for the release to the respondents of all the deposits made in Court under the consent order of 31st October, 2006; but the consent order did not provide for such release of funds, and the respondents herein had not prayed for such a decision;

(vi) The appellant was not accorded a hearing in respect of the claim contained in the amended plaint dated 13th March, 2006 by which she was seeking specific performance of a contract against 2nd and 3rd respondents;

(vii) By the order of release of the money deposits to the respondents on 27th May, 2010, the learned magistrate passed a judgment in favour of the respondents, without hearing the appellant yet the deposits were for security and could be released after the suit was heard and determined.

(viii) Since the appellant has lodged an appeal against the said ruling of 27th May, 2010, it would be fair and just to grant stay of execution of the orders made in the said ruling of 27th May, 2010, pending the hearing and determination of the appeal;

(ix) Granting the orders sought will occasion no prejudice to the respondents, but not granting such orders will occasion the appellant irreparable loss and damage;

(x) The appellant's appeal from the ruling of 27th May, 2010 has "very high chances of success."

The evidence to support the application and its grounds, is set out in detail in the appellant's supporting affidavit sworn on **4th June, 2010**.

The 1st respondent swore a replying affidavit (filed on **25th June, 2010**) on behalf of the three respondents, deponing that he had leased to the appellant a warehouse on plot No. Mombasa/Block XIX/315, at which the appellant continues to-date to conduct business; the lease period was for five years and three months as from **1st September, 2004** to **30th November, 2009** which period expired seven months ago. The deponent averred that the appellant had defaulted in rent payment, having issued and then countermanded a cheque in the name of the lessor for Kshs.125,000/= and so, on **24th May, 2006** the lessors secured the levying of distress for arrears of rent amounting to Kshs. **148,500/=** due as at **May, 2006**.

The deponent believes to be true the information received from his advocate, that the auctioneers instructed to levy distress on the lessor's behalf, were refused entry to the suit premises, and thereafter the appellant moved the court by Chamber Summons dated **19th June, 2006** seeking orders to stay the distress-for-rent action; and she obtained the orders sought. The learned Senior Principal Magistrate heard the application *inter partes*, and, on **17th August, 2006** dismissed the same; and the lessor's advocates, by their letter of **16th August, 2006** instructed the auctioneers to proceed with the levying of distress. The appellant returned before the Court under certificate of urgency, and sought a permanent injunction against the levying of distress by the lessors: and to that application, a temporary order of stay was granted by the Senior Resident Magistrate on **23rd August, 2006**. The said application was subsequently heard *inter partes* before the Senior Principal Magistrate, and a consent judgment arrived at. By the consent, the appellant was to deposit in Court the accrued rent up to **31st October, 2006**, being Kshs.405,000/=.

Contrary to the appellant's averment, 1st respondent deposed that "the above-mentioned deposits were not

security for the suit.....but was rent due and owing to me.” The deponent deposed that the consent order provided for “all future rents in respect of the leased premises [to] be deposited in Court as and when the same fell due until the suit was heard and determined”; the deponent averred that “the appellant defaulted for four months after the consent” – and the default –amount stood at Kshs. 445,500/= as at **31st December, 2008**; and on this account, it became necessary for the lessor’s advocates to make execution, in terms of the order of **31st October, 2006**.

The deponent averred that on **15th January, 2009**, the appellant issued cheque No. 100179 bearing the same date, in the sum of Kshs.315,000/=, to the Court ? and this fell short of the rents due. The said cheque, as it turned out, was not honoured by the bank; and the appellants took no action to replace the same – the effect being that, as at **12th May, 2009** the appellant had already defaulted in rent payment to the tune of Kshs. 674,550/=. The lessor’s advocate , by letter of **30th July, 2009** asked the Court’s Executive Officer for warrants of attachment and sale against the appellant, to recover the unpaid sum of **Kshs. 693,445/=**. At the instance of the Executive Officer, the matter was listed for mention, and a consent was recorded on **18th August, 2009**: that payment would be confirmed at another mention on **25th August, 2009**, in respect of rents payable between **July 2008** and **August, 2009**, and in default, the consent order of **31st October, 2006** would take effect.

The deponent deposed that, the appellant again defaulted in rent-payment, and, the lessor’s advocates sought execution of distress and sale on **7th August, 2009**, for Kshs. 722,345/=. To avert execution, the appellant moved the Court by application on **13th October, 2009**, seeking stay of the issuance of warrants, even though the same were yet to be issued. On **15th October, 2009**, the Court granted the appellant a temporary order of stay, pending *inter partes* hearing of her application dated **13th October, 2009**; and after that application was heard, the learned Chief Magistrate delivered her ruling on **27th May, 2010**. The relevant part of the Court’s ruling may be set out here.

“.... [Learned counsel] does not dispute that as far as the Court records show, this [rent payment] [is] outstanding. [It] is evident ...that the plaintiff absolutely lacks merit...in this application and is, in my view, just engaged in a time-buying exercise. Unfortunately for the plaintiff, the lease period has now expired and any further occupation of the premises is not based on any valid agreement. She cannot even claim to be a protected tenant under [the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, (Cap.302, Laws of Kenya)), as the defendant has not received any rent from her, from way before the lease expired. I therefore see no reason why execution should not issue against her and order the same.....”

The learned Chief Magistrate went a step further and indicated the dispensability of the main suit:

“Finally, it is in my view not necessary for the main suit to be heard because, through this ruling, the issues raised therein have been determined. It is only fair in the circumstances for the defendants to enjoy the fruits of their investment which has been in the Court accounts since 2008. I hereby direct that, barring any other lawful Court order, the same shall be released to the defendants”

The 1st defendant deposed that the background of the case herein showed that the appellant has changed advocates several times; has several times entered into consents on rent-payment which she did not adhere to; and has on a good number of occasions, moved the Court by applications for stay of orders issued following her breaches of the consent orders.

The deponent expressed his objection to rent-moneys deposited in Court remaining there any further; in his words: “it is rent owing to me for a long time now and I am [in bad health and] requiring treatment; the same would go a long way to meeting the cost of my treatment”.

The deponent averred that even as at the date of the ruling, on **27th May, 2010**, the appellant was in arrears of rent in the sum of Kshs. 661,450/=; and that the amount expected to be deposited in Court as rent as at **31st May, 2010** was **Kshs.2,637,450/=** whereas the deposit by that date confirmed by the Court

was Kshs. 1,977,000/=

Counsel for the appellant/applicant submitted that the applicant had a meritorious appeal, with “very high chances of success”. Counsel went to urge as follows: the applicant had filed in the lower Court SRMCC NO. 2019 of 2006 seeking orders of specific performance; on **23rd August, 2006** the applicant filed an application for injunctive orders; the said application was compromised on **31st October, 2006** when the parties recorded a consent; the respondent had filed an application dated **5th September, 2006** seeking security for the rent arrears due from the applicant herein, and the same was compromised by the consent of **31st October, 2006**.

Counsel contested the Chief Magistrate’s ruling of **27th May, 2010** on the ground that she should not have dismissed the entire suit, for: “once legal proceedings are commenced and more so in civil matters, time stops running, and thus the purported lease period could not have expired while the matter was still pending in Court”.

Counsel urged that even assuming the lease period had expired, the appellant’s amended plaint seeks specific performance of a contract of sale between the applicant and 2nd and 3rd respondents, and so the learned Chief Magistrate should have taken this issue into consideration. Learned counsel submitted that the applicant’s case in the pending appeal is not as regards the dismissal of her application in the ruling of **27th May, 2010**, but against the dismissal of the entire suit, and against orders for the release of monies deposited as rent-payment security.

Counsel for the respondent submitted that, by the consent orders of **31st October, 2006**, the respondents were allowed to execute attachment, in the event that the applicant herein failed to comply with the terms. The terms of the orders of **31st October, 2006** may be set out here:

“(1) THAT all outstanding rents since March 2006 to November 2006 amounting to ksh.405,000/= be deposited in Court within the next 45 days from the date hereof and thereafter all future rents in respect of the tenancy premises be deposited in Court as and when they fall due.....until the suit is determined.

“(2) THAT by further consent no distress to be levied until the suit is determined.

“(3) THAT in default of payment of the deposits.....in Court, execution to issue.”

On **7th October, 2009**, the respondents moved to execute against the applicant herein, for arrears of rent which the applicant had not duly deposited in Court contrary to the terms of the consent order of **31st October, 2006**. Learned counsel submitted that the execution based on the consent order emanated only from that order, and was “not the subject of any other proceedings”

Counsel urged that the monies deposited as rent arrears in Court, by the applicant, were monies due to the respondents, and should be paid over to the respondents.

What is before this Court is not the substantive appeal, but an application occasioned by the orders of the learned Chief Magistrate made on **27th May, 2010**, with regard to the release to the respondent of rent-arrears monies deposited in Court by virtue of the consent order of **31st October, 2006**.

From the nature of the monies thus deposited, and by all the evidence on record, there is no reason for the Court to detain the monies, as the orders supporting their being held are properly in place and are not the subject of any further litigation. The applicant has not shown why such monies should continue to be withheld from the true owner, when their status so clearly stands apart from the course of litigation being pursued by the applicant. I find merit in the orders of the Chief Magistrate releasing the monies deposited in Court. As regards other aspects of the orders of the learned Chief Magistrate, they stand to be determined as part of the applicant’s appeal filed on **14th June, 2010**.

The applicant's application of **14th June, 2010** is dismissed, with costs to the respondents.

Orders accordingly.

DATED and DELIVERED at MOMBASA this 3rd day of October, 2010.

.....
J. B. OJWANG
JUDGE