



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE 180 OF 2009

SONY AUDIO CORNER LIMITED.....PLAINTIFF

VERSUS

JOSEPH MUCHOKI MUGO1ST DEFENDANT

JUSTUS MATUNDURA t/a

JUMBO AIRLINK AUCTIONEERS.....2ND DEFENDANT

RULING

The plaintiff moved to this court, vide a plaint dated 23rd April 2009 and filed the same date. The salient features of the same are as follows.

- The plaintiff and others were tenants of the 1st defendant. A dispute arose between them and the matter went before the BPRT whereby judgement was entered in favour of the landlord.
- They then appealed to the high court vide HCCA No. 637 of 2008 and obtained stay orders of the tribunal orders.
- The stay orders were conditioned to the plaintiff depositing into court Kshs. 500,000.00 within 15 days of the making of the order.
- Despite of the existence of the stay orders, the 1st defendant in utter contempt of the said order, Surreptitiously commenced the demolition of the demised premises.
- The 1st defendant was aware of the said orders but decided to go against those orders.
- In the process, the 1st defendant also purported to levy for distress and carted away all the plaintiff goods valued at the figures specified in paragraph 17 of the plaint.
- Among the relief being sought, were a permanent injunction to restrain the defendants jointly and severally either through themselves, their servants and/or agents or any person howsoever from interfering with all that property known as LR NO. 209/2523 by interalia demolishing, constructing or otherwise altering the property in any manner howsoever to the detriment of the plaintiff.

(b) A mandatory injunction, compelling the 1st defendant by himself, their officers, servants and/or agents to reconstruct the property known as LR. NO. 209/2523 to its original condition as before the unlawful demolition and reinstate the plaintiff as a tenant on the same terms as existed before the unlawful demolition of 11th April 2009.

(c) Damages for the loss of business and profit for the period of demolition.

(d) Loss of stock and furniture and fixtures during the demolition.

(e) Costs

Simultaneous with the filing of the plaint was filed a chamber summon dated the same 23rd April 2009 and filed the same date. It seeks 5 prayers.

Prayer 1 is spent

Prayer 2 and 3 seek restraint orders in the first instance vide prayer 2 pending the hearing of the application interpartes, and pending disposal of the suit as per prayer 3. The defendants either through himself, servants and or agents or any person howsoever working on his behalf from conducting any further demolitions, constructions and or alteration on the property known as LR. No. 209/2523.

- *The court is asked to make any further orders as the circumstances of the case may deem fit.*
- *That cost of the application be provided for.*

The grounds are set out in the body of the application, supporting affidavit, annexures and oral highlights in court. These are:-

- The applicant is the lawful tenant of the suit premises.
- The orders issued by this court, alleged to have been breached confirm that he is the lawful tenant.
- Reiterate the content of the plaint to the effect that indeed a dispute arose between them and the landlord who is the 1st defendant, which dispute was determined by the BPRT in favour of the landlord. They appealed to the high court, against that judgement and stay orders were given followed by a temporary order restraining demolition which orders were obtained in the presence of the 1st defendant and their counsels.
- The presence of the respondents and his counsels during the making of the said orders, notwithstanding, the said orders were extracted and served on the respondents on the 13th day of March 2009.
- The above service notwithstanding, the applicant has knowledge that the 2nd defendant proceeded to complete the demolition of the said premises on the 11th day of April 2009 and carted away the applicants' goods and stock in trade.
- Contend that by reason of the stay and injunctive orders, being in place, the applicant is deemed to be the lawful tenant of the premises and is therefore entitled to protection.
- Contend that the said wanton destruction has caused the applicant damages and loss amounting to Kshs. 6, 293,559.00 as loss of stock and Kshs. 5,410,000.00 as loss for furniture.
- By reason of matters aforesaid, the applicant is apprehensive that the applicant will suffer irreparable loss.

- They rely on the annexures to demonstrate demolition and the value of the goods carted away.
- Urge the court, to ignore the content of the replying affidavit as it refers to an order not subject of these proceedings.

The defendant/respondent has opposed the application on the basis of the content of the replying affidavit and oral submission in court. The sum total of the same are:-

- Concedes existence and participation in the BPRT proceedings in which the applicant and other tenants also participated.
- Judgement was given in the respondents' favour concede appeal No. 637 of 2008 was filed, and stay order obtained but these were conditional to the applicant and others depositing Kshs. 500,000.00 in court within 15 days from the date of the order, and file and serve the record of the appeal within 60 days from the date of the order of 4th February 2009.
- That upon failure to comply with the conditional stay the tribunal order took effect.
- Applicant cannot rely on the orders made in HCCA 637/2008 herein and if they have any complaint then the same should be addressed in that appeal file and their consequences cannot be imported into these proceedings.
- Contend that applicant had knowledge that the complained of building had been condemned as unfit for habitation and has to be brought down for new and better business premises to be set up.
- That there is no dispute as to the 1st defendant's ownership of the same and as such he should not be restrained from developing the same.
- That he has gone a head to secure funds through borrowing, has plans approved and commenced development and it is his stand that if restrained he will suffer irreparable loss.
- The restraint order sought is not the best order to be given more so when the applicant is demanding that premises be constructed for him and to be mandatorily restored in the same.
- It is their stand that by reason of the above, the injunctive relief sought cannot be granted.
- The court, is invited to hold that the tenancy of the applicant was legally terminated and if the applicant has any genuine complaint that can be addressed through compensation by way of damages which the applicant has already quantified and prayed for in the plaint.
- Further that if the injunctive relief sought is granted, then the same will be in vain as the substratum of the application no longer exists.

On case law, the court, was referred to the case of **GIELLA VERSUS CASSMON BROWN (1973) EA 358** where the principles on injunctions are laid out. These are:

- (iv) An applicant must show a prima facie case with a probability of success.
- (iv) An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.
- (vi) When the court, is indoubt it will decide the application on the balance if convenience.

Due consideration has been made by this court, of the rival arguments herein and considered the same in the light of the now orthodox principles guiding the courts, in the granting of such relief and the court, proceeds to make the following findings:-

1. It is common ground that the dispute between the disputants was in the first instance adjudicated upon by the BPRT which ruled in favour of the respondent.
2. The applicant and others who were victims of the said BPRT judgement became aggrieved and the applicant filed appeal no. 637/08 and prudently sought stay orders.
3. It is common ground that indeed conditional stay orders were granted. The applicant is silent as to their compliance with those orders. The stand of the respondent as demonstrated by the content and annexures on record to the replying affidavits, is that the conditions were not complied with. Thus ushering in the operation of the tribunal judgement whereby the respondent had orders to demolish an alleged condemned building and put up another one.
4. It is apparent that as at the time the applicant moved to this court, demolition had commenced and as at the time the interim application was heard the demolition had been completed and funds sourced and construction commenced by the 1st defendant who is the undoubted owner of the suit premises.

The question that this court, has to determine is whether in the wake of the above findings an injunctive relief in the manner sought is to issue. The response of this court, to that question is that the answer is in the negative. The reason being that:-

- (i).** An injunctive relief as this court knows it is an interim relief. It is meant to fore stall the happening of an event, likely to happen to the detriment of the party seeking the relief. What was meant to be forestalled was further demolition which the court, has been informed has already been accomplished and now construction commenced. This being the case granting an injunctive restraint relief will be in vain as there will be nothing to be restrained.
- (ii).** As regards the granting of a mandatory injunction, the principles governing the granting of this relief have now crystalized. The relief is available in clear and plain cases where a summary procedure can be resorted to. Applying this ingredient to the facts herein, it is clear that on the facts before this court, this cannot be stated to be a plain and obvious case. The reason being that in a case where the respondent has a judgement from the tribunal in his favour, which judgement has no stay orders in place stopping it from taking effect, because the applicant failed to comply with the conditions set, cannot be said to be plain and obvious. More so when it is now a known fact that the subject matter no longer subsists. This is a matter which has to await for the interparties hearing of the main suit to take effect so that should the trial court, find that the plaintiff has a genuine complaint, against the 1st respondent, the court, can order the relief availed to the applicant at the conclusion of the full trial as opposed to having the same granted at the interlocutory stage.
- (iii).** Indeed as submitted by the respondents, since the applicant has quantified his claims and he can safely be compensated for by way of damages. The only exception to this rule as established by case law that this court has judicial notice of is where it is demonstrated that the opposite party has acted in a high handed and oppressive manner towards the applicant, and also in flagrant breach of the law. Herein the 1st respondent has deponed in his replying affidavit and annexed exhibits among them court orders whereby the applicant was granted conditional stay orders which he failed to comply with namely deposit of Kshs 500,000.00 within 15 days and filing of the appeal within 60 days. There is no further affidavit filed by the applicant controverting the respondents deponement in the replying affidavit by annexing the deposit slip for Kshs. 500,000.00. in the first instance and in the second instance by demonstrating that he has filed an appeal. In this courts', opinion, in the absence of a stay order, the 1st respondent cannot be said to have acted in a high handed, oppressive manner and in breach of the law in order to enable this court grant an injunctive relief as opposed to an order that damages will be an adequate compensation.
- (iv).** There is also the issue of the balance of convenience. In the circumstances of this case, a situation where the respondent failed to comply with conditional stay orders, thereby enabling the opposite party to reap the fruits of his judgement, and in pursuance of that enjoyment has made financial commitment to 3rd parties such as acquisition of loans and has in effect commenced construction, the balance of

convenience tilts heavily in his favour. Which balance requires that an injunctive relief should not be issued against him.

For the reasons given in the assessment, the applicants' application dated 23/4/09 and filed on the same date has been found by this court to have no merit. The same is dismissed with costs to the respondent to it.

DATED, READ AND DELIVERED AT NAIROBI ON THIS 26TH DAY OF JUNE 2009

R.N. NAMBUYE

JUDGE