



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Appeal 202 of 2009

SURERA JAMA MOHAMED.....APPELLANT

VERSUS

ABDULLAHI WARSAME ALI

T/A NADHIA AUCTIONEERS.....1ST RESPONDENT

ABDI MOHAMED ABDILE.....2ND RESPONDENT

R U L I N G

1. By a notice of motion dated 23rd April, 2009, the appellant, Surera Jama Mohamed, has moved this court for an order staying execution of the ruling and order made on 17th, April, 2009 by Ms. K. Ireri, Resident Magistrate in the CM's Court at Milimani. In the ruling the Resident Magistrate reviewed and set aside the *ex-parte* orders she had made on 10th March, 2009, ordering the eviction of the 2nd respondent, Abdi Mohamed Abdile from LR No.36/11/138-5th Street Eastleigh (hereinafter referred to as the suit premises). The appellant has filed an appeal against that ruling. He is now seeking an order of stay of execution contending that the order of 17th April, 2009 was made without jurisdiction and that the order is a nullity.

2. The appellant has filed a supporting affidavit, in which he explains that the 2nd respondent was evicted from the suit premises pursuant to orders issued on 10th March, 2009. The appellant contends that he has entered into a fresh lease agreement with one Katra Sata Jama who has already taken possession of the suit premises. The appellant maintains that the trial magistrate was *functus officio* after making the order of 10th March, 2009. He also contends that the trial magistrate had no jurisdiction to order reinstatement of the 2nd respondent to the suit premises, without a substantive suit being filed. The appellant contends that unless the order of stay of execution is granted, he will suffer substantial loss as the 2nd respondent has outstanding rent arrears of Kshs.2,700,000/= as well as arrears in respect of electricity and water.

3. In support of the application, counsel for the appellant relied on the following cases:

- ***Nakuru Packers Limited vs Monica Nyambura Waititu HCCC No.71 of 2002 [2004 eKLR]***
- ***Isaac Ndungu Muchemi vs Marula Estates Limited HCCC No.111 of 1995 [2006 eKLR]***

- **Agip (K) Ltd vs Vora [2000] 2 EAR page 283**
- **Avenue Fresh Produce Ltd vs Vijay Kumar Shamji Patel [2008] eKLR**

4. Abdi Mohammed Abdile the 2nd respondent has filed a replying affidavit objecting to the appellant's motion. He contends that he has been in occupation of the suit premises pursuant to a sub-lease agreement entered into with the appellant from 1st March, 2007. On 18th March, 2009 he was served with an eviction order which was obtained *ex-parte* without his being heard. The 2nd respondent moved the court on the same day and obtained an order staying the eviction order. He served the appellant with the order of stay on 19th March, 2009.

5. Notwithstanding the service of the order of temporary stay, and a further order made by the Resident Magistrate for maintenance of the *status quo*, the appellant evicted the 2nd respondent from the suit premises on 20th March, 2009. On 16th April, 2009, the 2nd respondent's application was heard and on 17th April, 2009, the order subject of the appeal was issued. The respondent maintains that the order of eviction was irregularly issued *ex-parte*. The respondent further maintains that there was no suit filed, upon which the order of vacant possession made by the Resident Magistrate could be predicated.

6. Mr. Mungla who appeared for the 2nd respondent relied on **HCCC No.585 of 2004 Tavuri Clearing and Forwarding Ltd vs Charles Kalujee Lwanga**. Counsel submitted that where there was injustice occasioned to a party an application made by the aggrieved party is irresistible. In this regard counsel relied on **Civil Application No.170 of 2000 S.M. Mwenesi vs Shirley Luckhurst and K.H. Osmond**. Relying further on the case of **Said bin Seif vs Shariff Mohamed Shatry [1940] KLR Vol XIX 9**, counsel argued that an order made without jurisdiction can only attract a setting aside.

7. Counsel contended that the allegation that the 3rd party had taken over the suit premises was not true. He submitted that the court had ordered the status quo to be maintained on 2nd April, 2009 and the appellant could not therefore lease out the suit premises in contravention of the court order as purported in the agreement alleged to have been signed on 3rd April, 2009. Counsel submitted that if the 3rd party was in possession of the suit premises, the possession was in contravention of the court order, and the 3rd party must therefore suffer the consequences. Counsel for the respondent distinguished the case of **Avenue Fresh Produce Ltd vs Vijay Kumar Shamji Patel** (Supra), contending that the facts were different as the transfer to the 3rd party was not made in violation of the court order.

8. I have carefully considered this application and the submissions made before me. The circumstances of this application are rather unique, in that an order for eviction of the appellant was issued without any suit being before the court, and an order has now been issued setting aside the eviction order and reinstating the respondent into the suit premises. It has been argued that the order made on 17th April, 2009 reinstating the respondent in the suit premises is null and void as the trial magistrate was *functus officio* and has no jurisdiction to make the order. That is an issue that will have to be determined at the hearing of the appeal. At this stage, the order of 17th April, 2009 remains a lawful order of the court capable of being executed. There are also contending arguments as to whether the eviction order was executed when there was a temporary order of stay and an order for maintenance of the status quo in force. That notwithstanding, it is not disputed that the eviction order was executed. In effect, the execution of the orders made by the trial court on 17th April, 2009, means that the respondent will be reinstated into the suit premises.

9. The issue before this court is whether the applicant will suffer substantial loss if the respondent is reinstated into the suit premises. The applicant maintains that he will suffer substantial loss in two aspects. Firstly, because the respondent owes it a sum of Kshs.2.7 million in rent arrears, and secondly, because the applicant has already entered into a tenancy agreement with a 3rd party who is alleged to be in possession of the suit premises.

10. With regard to the tenancy agreement with the 3rd party, the applicant entered into that agreement when there was already a dispute between him and the respondent. In entering into the agreement with the 3rd party, and even giving the premises to the 3rd party immediately after the eviction of the respondent, the applicant deliberately undertook a risk. It appears that, the applicant was apparently trying to steal a march on the respondent by putting the premises beyond the reach of the respondent through involving the 3rd party. The hands of the court cannot therefore be tied by the possibility of loss brought about by the applicant's own deliberate calculation.

11. As regards the alleged rent arrears of Kshs.2.7 million, the applicant did not raise any dispute regarding rent before the trial magistrate. The issue of rent is obviously an afterthought. It is evident that if the order issued on 17th April, 2007 is stayed, the respondent will be prejudiced. For the above reasons, I find that it would not be in the interest of justice to grant the order of stay of execution pending appeal. I therefore dismiss the application dated 23rd April, 2009 with costs.

Orders accordingly.

Dated and delivered this 10th day of June, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Hassan for the appellant

Mungla for the respondent

Erick – Court clerk