



MARY MUTHONI NDUNGU.....APPELLANT

VERSUS

KENYATTA NATIONAL HOSPITAL STAFF

SUPERRANNUATION SCHEME.....1ST RESPONDENT

KIRAGU & MWANGI LIMITED.....2ND RESPONDENT

RULING

1. Mary Muthoni Ndungu, hereafter referred to as the applicant is dissatisfied with a ruling delivered by the lower Court on 30th July, 2009 in Nairobi CMCC No. 3824 of 2009. She has lodged an appeal and now seeks orders under Order XLI Rule 4(6), Order XXXIX Rules 1, 2 & 9 of the Civil Procedure Rules as follows:

- (i) That the instant application be certified as urgent and be heard *ex parte* in the first instance.

- (ii) That pending the hearing and final determination of the appeal herein there be an order of injunction restraining the defendants by themselves, their servants, employees and/or servants from interfering in whatsoever manner with the applicants quiet possession of Flat No.12 on L.R. No. 209/118/17/2 Chemilil Road, Nairobi on condition she pays the monthly rent due.

- (iii) That pending the hearing of the instant application *inter partes* there be an interim order in terms of prayer 2 hereinabove on such condition as the Court may impose including the deposit of the disputed Kshs.84,000/= in Court and/or undertaking on damages.

- (iv) That the *inter partes* hearing of the subject matter be heard during the impending High Court Vacation.

Prayers Nos.1,3 &4 have already been dealt with and what is therefore now before this Court for determination is prayer No.(ii).

2. The application is supported by grounds stated on the Chamber Summons as follows:

(a) That the applicant has lodged an appeal against the ruling delivered by the lower Court on 30th July, 2009 in Nairobi CMCC No.3824 of 2009 and unless the orders sought are granted the appeal will be rendered nugatory.

(b) That appellant is not in breach of any tenancy terms and is up-to-date with her monthly rent payment upto and until July, 2009.

(c) That the dispute between the parties relates to an alleged rent increment imposed by the 2nd respondent and upon challenge of the same by the applicant the 2nd respondent gave the applicant a notice to vacate the premises on or before 30th June, 2009 vide its letter dated 2/6/2009.

(d) That the applicant has an arguable appeal with high chances of success and stands to suffer irreparably as the lower Court failed to exercise its discretion judiciously and thereby failed to grant an injunction sought, inspite of the fact that the law and facts were in the applicant's favour. By reason of the lower Court's ruling delivered on 30th July, 2009 the applicant and her child of tender years is at the risk of being bundled out and/or denied access of the suit premises by the 2nd respondent.

(e) That the instant application has been brought without undue delay.

(f) That the applicant is ready to offer such undertaking as the Court may impose or deposit the amount demanded by the 2nd respondent amounting to Kshs.84,000/= in Court pending the hearing and final determination of the appeal.

(g) That the interests of justice dictate that the orders sought be granted.

3. The application is also supported by an affidavit sworn by the applicant on 31st July, 2009, as well as a supplementary affidavit sworn on 28th September, 2009. A copy of the ruling subject of the applicant's appeal has not been availed. However it is evident from the grounds and the supporting affidavit, that the Court rejected the application for an interlocutory injunction which was sought by the applicant in the lower Court, to restrain Kenyatta National Hospital Staff Superannuation Scheme and Kiragu & Mwangi Limited, (hereinafter referred to as the respondents), their servants, agents or any other person claiming under the respondent from interfering with the applicant's quiet possession or evicting the applicant from the suit premises situated on L.R. No. 209/118/17/2 Flat No. B12 Chemilil Road Nairobi, pending the hearing and determination of the suit which the applicant had filed against the respondents.

4. Since the applicant is seeking an order of interlocutory injunction pending the hearing of her appeal, she has to demonstrate to this Court that her appeal is arguable and *prima facie* has chances of success. The applicant has not availed a copy of the ruling of the lower Court. This omission is fatal as this Court is unable to appreciate her complaints about the ruling, or assess whether the appeal *prima facie* has probability of success. Secondly, the applicant has not demonstrated that she will suffer irreparable loss if the order sought is not granted.

5. It is true that the applicant stands to be evicted from the suit premises unless the orders sought are granted. Nonetheless this Court has to balance the interests of the applicant against that of the respondent. The applicant is not a protected tenant. Her occupation of the premises is dependent on the tenancy agreement and goodwill of the respondents. She has a choice to leave the premises if she is not agreeable to the increase in the rent.

6. Noting that the applicant is a monthly tenant legally entitled to one month's notice before termination of her tenancy, I will allow her application only to the limited extent of granting a temporary order of injunction restraining the respondent by themselves, their servants, employees or agents from interfering with the applicant's quiet possession of the suit premises or evicting her from the suit premises within the next 30 days with effect from today.

Those shall be the orders of this Court.

Dated and delivered this 21st day of October, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Advocate for the applicant, absent

Ndirangu for the respondent

Eric, court clerk