

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 726 OF 2005

L'ILE DE FRANCE PASTRY LIMITED.....APPELLANT

VERSUS

GIGIRI SHOPPING CENTRE LIMITED.....RESPONDENT

RULING

The Respondent in this appeal has raised a preliminary objection to the appeal on a point of Law. That point is that the court has no jurisdiction to hear the appeal because the orders appealed against were given by a court that had no jurisdiction to grant them.

I have considered the written submissions filed on behalf of the parties and the cases cited. No oral submissions were made. The Appellant is the plaintiff in the lower court while the Respondent is the defendant. The Appellant claimed by plaint dated 9th July, 2004, *inter alia*, for a declaration that the Respondent's refusal to renew the Appellant's lease is unlawful, an order to compel the Respondent to renew the lease for a further term of 5 years and 6 months and an injunction to restrain the Respondent from evicting the Appellant from the premises.

The Respondent filed defence denying liability. It also counterclaimed for an order that the Appellant gives vacant possession of the premises (and in default eviction to issue), and a sum of KShs. 264, 000/00 said to be outstanding service charge. Following a request for judgement in default of defence the same was entered for the Respondent upon its counterclaim, and decree issued. It appears that the Appellant was evicted from the premises in execution of that decree.

The Appellant then filed an application to set aside the default judgement. That application was allowed on 16th September, 2005 and the Appellant granted leave to file defence to the counterclaim. By the same application the Appellant also sought a mandatory injunction to compel the Respondent to reinstate it into the suit premises. The lower court ordered that the said prayer for mandatory injunction be canvassed at the hearing of the suit. It is that order that the Appellant has appealed against in this appeal.

It is the Respondent's case in this preliminary objection that the lower court had no jurisdiction to entertain the Appellant's suit. The Respondent's learned counsel submits that it is trite law that the High Court has no jurisdiction to entertain an appeal from orders or decrees made by a subordinate court without jurisdiction. He is, with respect, wrong. If the High Court cannot correct on appeal orders or decrees issued by subordinate courts without jurisdiction, who would? The cases cited by learned counsel as authority for that proposition are actually authority for the proposition that this court has no jurisdiction to transfer a case from a subordinate court that had no jurisdiction in the first place to entertain the suit to another subordinate court or to itself. That is an entirely different thing.

The Respondent has conceded that the subordinate court had no jurisdiction to entertain its counterclaim. But it is content to enjoy the orders granted to it by the lower court without jurisdiction, yet it would not suffer this court to review them on appeal.

I find the preliminary objection to be disingenuous and misconceived. This court has jurisdiction to

entertain appeals against orders or decrees of the lower court given without jurisdiction. I ask again, if such illegal orders or decrees cannot be corrected by the High Court on appeal, who would?

The preliminary objection is not well-taken. It is hereby overruled with costs to the Appellant. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 11TH DAY OF JUNE 2008.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 13TH DAY OF JUNE 2008