



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 469 of 2008

AVANTI LIMITED.....APPELLANT

VERSUS

JASWANT VOHORA.....RESPONDENT

R U L I N G

On the 4th September, 2008, Avanti Ltd (hereinafter referred to as the appellant), moved this court by way of a notice of motion seeking *inter alia* orders of stay of execution of the orders made by Hon. Mochache, Chairman, Business Premises Rent Tribunal on 21st August, 2008 pending the hearing of the application *inter-partes* and also pending the hearing and determination of its appeal. The application was fixed for hearing on the 8th September, 2008. For some unclear reasons, the application did not come up for hearing on the 8th September, 2008. On the 9th September, 2008, the appellant's advocate appeared before Osiemo J. under certificate of urgency together with an amended notice of motion seeking similar orders as the motion earlier filed on 4th September, 2008. On the strength of that amended notice of motion the appellant was granted interim orders. He was further directed to serve the application on the respondent for *inter-partes* hearing on 23rd September, 2008.

On 17th September, 2008, Jaswant Vohora who is the respondent, came to this court under certificate of urgency and obtained orders to have the firm of Ogeto Otachi & Co. Advocates allowed to act for the respondent in place of Mbugua B.W. & Co. Advocates. On 23rd September, 2008 the matter came up for the *inter parte* hearing of the appellant's application but the application was adjourned to 29th September, 2008.

On 29th September, 2008 when the parties came before me for the *inter parte* hearing, Mr. Onyango who appeared for the appellant indicated that they were pursuing the notice of motion dated 3rd September, 2008 filed on 4th September, 2008 and supported by an affidavit sworn by Kiburu Njenga on the 1st September, 2008. In the affidavit, the appellant explained that he has filed an appeal against the order of the Tribunal issued on 21st August, 2008. He maintained that unless orders for stay of execution are granted, the effect of the order of the Tribunal would be to have him vacate a workshop situated on plot 37/1404 along Solai Road (hereinafter referred to as the premises). The appellant maintains that such an action would cause him irreparable loss as he has been using the premises since the year 1993. The appellant further contends that if he were to be removed from the premises, his appeal would be rendered nugatory. The appellant expressed a willingness to abide by any order for security for the performance of the decree. The appellant's counsel filed various authorities which he relied upon and urged the court to find that the appellant has satisfied all the conditions for granting an order of stay of execution.

The respondent objected to the application through his replying affidavit sworn on 18th September, 2008 and a replying affidavit sworn by Caroline Anyango Oloo, an accountant employed by the respondent. In his affidavit, the respondent conceded that the appellant has been a tenant in the premises since the year 1993. The respondent however maintains that since the year 1999, the appellant has subjected him to a lot of difficulties through his defaulting in the payment of rent for the premises. This led to the respondent serving the appellant on 27th September, 2007 with a notice to terminate the tenancy. The appellant referred the notice to the Business Premises Tribunal and the Tribunal after hearing the reference, issued the order of 21st August, 2008 upholding the notice and giving the respondent liberty to levy distress

for recovery of the rent arrears. The respondent maintained that the appellant owes rent arrears of Kshs.341,660/=, and this has caused the respondent a lot of economic and financial hardship. The respondent also exhibited copies of orders previously obtained by the appellant in the Chief Magistrate's court at Nairobi wherein the appellant was granted an order of temporary injunction on the 17th August, 2004, on condition that he deposited rent arrears of Kshs.193,000/= into court, and another order issued on the 19th November, 2007 by the Business Premises Rent Tribunal in which a reference filed by the appellant was dismissed. The respondent maintained that in view of the appellant's clear breach of the terms of the tenancy, the appellant was merely trying to use the application for stay of execution to further frustrate the respondent from recovering the premises. The respondent further contended that contrary to the monthly rent of Kshs.38,530/= which the appellant was paying for the premises, the current market rent for the premises is Kshs.120,750/= and the stay of execution would expose the respondent to substantial loss as he would be denied that rent.

Finally, the respondent maintained that the appellant was not deserving of the exercise of the court's discretion as he was not coming to the court with clean hands having failed to disclose material facts by failing to acknowledge the rent arrears.

In her affidavit, Caroline Anyango Oloo deponed that the books and statements of accounts in respect of rent collected from the appellant for the premises, revealed that the appellant has been constantly in arrears since the year 1999. To date, although the distress for rent was levied, there is still a balance of Kshs.341,660/= due and owing. She exhibited several cheques which were issued by the appellant in payment of rent but were dishonoured upon presentation.

Counsel for the respondent submitted that the appellant having appeared before Osiemo J. with an amended notice of motion, he could not go back to the original notice of motion. It was further submitted that the amended notice of motion was an abuse of the court process as the same was amended without leave of the court. The court was therefore urged to strike out the amended notice of motion as the same was improperly before the court. In this regard, counsel for the respondent cited the following authorities: -

(i) *Orbit Chemical Industries Ltd vs Otieno Odek & Co. Advocates*, 162 of 2006 (Nairobi).

(ii) *Central Bank of Kenya vs Kamal Shah*, Misc. Appl. No. 427 of 2000, Nairobi Milimani Commercial Courts.

It was further submitted that it was not clear from the two motions filed by the appellant as to what he wanted to stay. It was maintained that if the intention was to stay the order of the Business Premises Rent Tribunal which was annexed to the supporting affidavit then, that order has already been executed, distress having been levied and there was therefore nothing to stay. It was contended that there was no specific prayer for stay of execution of the order for vacating the premises. It was maintained that the averments made by the respondent regarding rent arrears, were not specifically challenged by the appellant. It was contended that the appellant had not demonstrated that his appeal had any likely chances of success as no proceedings or ruling of the tribunal were exhibited. Counsel cited various authorities in support of this position and submitted that the appellant did not merit the order for stay of execution. Counsel further submitted that the appellant had not supplied the court with any material upon which the court can deduce that he has suffered or he is likely to suffer substantial loss. Nor has the appellant shown that he will not be able to get alternative premises if evicted from the suit premises. Finally it was submitted that the appellant had failed to offer any security for the performance of the decree.

It is clear from the court record that there is the original notice of motion filed by the appellant on the 4th September, 2008 and an amended notice of motion filed on 9th September, 2008. It is further apparent from the court record that the original notice of motion which was fixed for hearing on 8th September, 2008 did not come up for hearing on that date. Subsequently, the appellant appeared before Judge Osiemo under certificate of urgency with the amended notice of motion filed on the same day. It is therefore the amended notice of motion that was basis of the interim orders granted by Osiemo J. It is also the same amended notice of motion which was fixed for hearing on 23rd September, 2008. Although the court whilst adjourning the motion to 29th September, 2008, indicated that the notice of motion was the one dated 3rd September, 2008, that was an error as the original motion dated 3rd September, 2008 was not the one before the court. That is to say that, although the counsel for the appellant purported to argue the notice of motion dated 3rd September, 2008 and filed on 4th September, 2008, that was not the motion which was before the court. Moreover, the appellant having purported to amend the original motion the same was no longer available for hearing as he could only proceed with the amended motion. Secondly, no leave having been obtained from the court for amendment of the original motion, the amended notice of motion was improperly before the court. To that extent the appellant's amended notice of motion is incompetent and ought to be struck out on that ground alone.

Further, although the appellant's advocate maintained that they were proceeding with the original notice of motion filed on 4th September, 2008, it is clear that the application was vague as to what the appellant wanted stayed.

According to the respondent, the order of the Business Premises Tribunal dated 21st August, 2008, appears to have taken effect with regard to the termination notice, dismissal of the appellant's reference and the levy of distress for rent. This was not disputed by the appellant. Presumably therefore, the appellant's efforts to stay the execution of the order of 21st August, 2008 can only relate to the order that the appellant vacates the suit premises. In effect, the appellant is seeking an order of temporary injunction restraining the respondent from evicting him from the suit premises pending the hearing of his appeal. In this regard, the appellant relied on the fact that he has filed an appeal and if evicted from the suit premises, his appeal would be rendered nugatory and he will suffer irreparable loss. For the court to grant the order sought by the appellant, it was necessary for the appellant to demonstrate that he has an arguable appeal which *prima facie* has probability chances of success. The appellant did not avail to this court any material upon which this court can arrive at such a conclusion. To the contrary, it is the respondent who has demonstrated that he stands to suffer substantial loss by missing out on the market rent for the premises if the order for stay of execution is issued. The respondent has also demonstrated that the appellant has been persistently in arrears of rent and that the Business Premises Rent Tribunal has previously dismissed a reference filed by him. These facts have not been controverted by the appellant. The appellant has therefore failed to demonstrate to this court that he has *prima facie* good appeal upon which an order for temporary stay of execution or temporary injunction can be anchored.

Further, in granting an order for stay of execution pending appeal or temporary injunction pending appeal the court has to weigh the interest of both parties. In this case, the appellant has failed to satisfy the conditions for granting orders of stay of execution or temporary injunction as provided under Order XLI rule 4 of the Civil Procedure Rules. Further, the appellant being in arrears of rent, he is not coming to this court with clean hands and there is no justification for denying the respondent the fruits of his judgment. Accordingly, I find no merit in both the amended notice of motion and the original notice of motion. The upshot of the above is that the appellant's amended motion filed on 8th September, 2008 is struck out as incompetent and the notice of motion filed on 4th September, 2008, is dismissed with costs.

Those shall be the orders of this court.

Dated and delivered this 24th day of October, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

A.I. Onyango for the appellant

Ogetto for the respondent