



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Appeal 712 of 2007**

**MORRIS KINYUA WAITHAKA & OTHERS.....APPELLANT**

**VERSUS**

**KENYA CREDIT TRADERS LIMITED.....RESPONDENT**

**R U L I N G**

By a chamber summons said to be brought under Section 3A and Section 75(1), Order XXI Rule 22, Order XLI rule 4(5) of the Civil Procedure Act and Rules, Section 15(1), (2) & (4) of the Landlord and Tenants, Shops, Hotels and Catering Establishments Act, Cap 301, Morris Kinyua Waithaka & Others, (hereinafter referred to as the appellants), have come this court seeking orders as follows:

- (1) (Spent)
- (2) The appellants/applicants herein be granted leave to file this appeal in terms of memorandum of appeal already filed herein, and/or alternatively, the appeal filed herein be deemed as properly filed.
- (3) The order granting the respondent possession of the shop premises situated on LR No.209/1413/20 along Accra Road, dated 2<sup>nd</sup> August, 2007, be stayed, and/or vacated and/or set aside pending the hearing and determination of the appeal filed herein, and/or pending further orders of this honourable court.
- (4) The respondent be restrained, by injunction from partitioning, subdividing, parting with possession, alienating, subletting, reconstructing the shop premises situated in the appellant's building on Accra Road until the hearing and determination of the pending appeal and/or further orders of this honourable court.
- (5) Any further orders or reliefs that may be found fair and just.

The application is supported by an affidavit sworn by Simon Waithaka Mwaniki in which he depones *inter alia* that the tenancy relationship between the appellants and the respondent Kenya Credit Traders Limited, in respect of premises known as L.R No.209/1413, (hereinafter referred to as the suit premises), has lapsed by virtue of abandonment. The deponent swears that the respondent discreetly removed its goods from the suit premises and pinned a notice on the door directing its customers to other premises. It was then that the appellant moved in and took over the premises in order to avoid the premises being vandalized. Subsequently, the respondent filed a complaint before the Business Premises Rent Tribunal which issued orders on 2<sup>nd</sup> August, 2007 directing the appellant to open the premises for the respondent in default of which the respondent was at liberty to break in and gain access.

The appellant contends that the respondent having regained access to the premises is now busy partitioning the premises with the intention of opening an exhibition hall to sublet to stall owners without the landlord's consent. Mr. Kamau who appeared for the appellant urged the court to grant the orders sought by the appellant as the Tribunal had no jurisdiction to reinstate the respondent into the suit premises.

In a replying affidavit sworn by Evanson Ngure Ndirangu, the general manager of the respondent, the deponent explains that the respondent has a five year lease subsisting from 1<sup>st</sup> June, 2007 to 31<sup>st</sup> May, 2012. The deponent further swears that the respondent did not abandon the suit premises but merely moved some of its stocks to another shop while they

were carrying out internal renovations to enable them continue their business of selling electronics and mobile phones. It is denied that the respondent has any intention of opening an exhibition hall in the premises with the intention of subletting.

Mr. Gichohi, counsel for the respondent, submitted that the appellant is seeking a mandatory terminal order which would have the effect of determining the appeal at an interlocutory stage. He submitted that the orders of stay of execution if granted would prejudice the respondent who is in occupation of the premises carrying out business. Counsel relied on the case of *Kebaso vs Chairman of the Board of Governors, Matongo Lutheran Theological College (2000) KLR 389*, where Nambuye J. held that a mandatory injunction should not be granted where innocent parties are likely to be affected. It was further submitted that the appellant had not satisfied the principles for granting interlocutory injunction as he had not established a prima facie case with regard to the appeal or that the appeal will be rendered nugatory if the application is not allowed. It was maintained that the appellant can be compensated by an award of damages. The court was therefore urged to dismiss the application.

Having carefully considered the application, the affidavit in support and in reply and the submissions of both counsels, I do note that the appellant filed an appeal on 20<sup>th</sup> August, 2007, against the orders issued on 2<sup>nd</sup> August, 2007 by the Tribunal. Under Section 15(1) of the Landlord & Tenants (Shops, Hotels and Catering Establishment) Act, “*any party to a reference aggrieved by any determination or order of a Tribunal made therein may within 30 days after the date of such determination or order appeal to the High Court.*” Counsel for the appellant did not make any specific submission with regard to the prayer for leave to file the appeal or deem the memorandum of appeal as properly filed. It is not therefore clear to me what orders are sought as the appeal appears to have been filed within time. Assuming however, that the application was for leave to appeal under Section 75 of the Civil Procedure Act, such application ought to have been made to the Tribunal before being made to this court. No evidence was however, availed to the court to show that any such application had been made to the Tribunal. For these reasons I decline to grant prayer No.2 of the chamber summons.

As regards the prayer for stay of execution, the orders made by the Tribunal on 2<sup>nd</sup> August, 2007 have in actual fact been executed and the respondent has been reinstated into the suit premises. The application now before the court is therefore not one for stay of execution as envisaged under Order XLI Rule 4(5) of the Civil Procedure Rules as the court cannot stay what has already taken place. With regard to vacating or setting aside the orders of 2<sup>nd</sup> August, 2007, pending the hearing of the appeal, that would have the effect of preempting the appeal as the legality and propriety of the orders issued on 2<sup>nd</sup> August, 2007 is the subject of the appeal. Prayer No.3 sought by the applicant is therefore not available.

With regard to prayer No.4, it is evident that partitioning, subdividing, alienating, subletting or parting with possession of the suit premises would render the appellant’s appeal nugatory. It is also likely to cause loss to the appellant as it may change the character of the suit premises without the appellant’s consent. Under Order XLI Rule 6 of the Civil Procedure Rules, the court has powers to grant orders of interlocutory injunction pending the hearing of an appeal. Although the appellant has not cited the right provisions, I find that this is an appropriate case where the court can exercise its discretion in the appellant’s favour.

Accordingly, I grant the application to the extent of issuing an order of interlocutory injunction restraining the respondents from partitioning, subdividing, alienating, subletting, reconstructing or in any way parting with possession of the suit premises pending the hearing and determination of the appeal. I further direct that the appellant shall file and serve a record of appeal within 60 days from the date hereof and take all necessary action to facilitate the speedy disposal of the appeal. In the event that the appeal is not determined within 12 months, the order for temporary injunction shall lapse.

Those shall be the orders of this court.

**Dated and delivered this 5<sup>th</sup> day of October, 2008**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Kamau for the appellant

Advocate for the respondent absent