



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

**Civil Appeal 519 of 2008**

**NARESH DARBAR..... APPELLANT**

**VERSUS**

**THARA ORCHARDS LIMITED.....1<sup>ST</sup> RESPONDENT**

**J.S. GATHUMBI T/A**

**GATHUMBI & ASSOCIATES CO. LTD.....2<sup>ND</sup> RESPONDENT**

**HAKI TRADERS.....3<sup>RD</sup> RESPONDENT**

**R U L I N G**

Naresh Darbar (hereinafter referred to as the applicant) being dissatisfied with the ruling and order made by the Chief Magistrate in Milimani CMCC No.4165 of 2000 filed a memorandum of appeal on 30<sup>th</sup> September, 2008 raising 4 grounds as follows: -

- (i) The learned magistrate erred in holding that the Magistrate's Court had no jurisdiction to entertain the appellant's suit by virtue of the provisions of Section 159 of the Registered Land Act Chapter 300 of the Laws of Kenya;
- (ii) The learned magistrate erred in striking out the appellant's suit, plaint and his chamber summons application dated 14<sup>th</sup> July, 2008;
- (iii) The learned magistrate erred in failing to grant prayer (c) of the appellant's chamber summons application dated 14<sup>th</sup> July, 2008;
- (iv) The learned magistrate erred in failing to strike out and/or dismiss the 1<sup>st</sup> respondent's notice of motion application dated 22<sup>nd</sup> July, 2008 with costs to the appellant.

On the same date the applicant moved this court by way of a notice of motion brought under Order XLI Rule 4, Order L Rule 1 of the Civil Procedure Rules and Section 3A and 63(c) & (e) of the Civil Procedure Act seeking inter alia orders as follows: -

***“The respondents be restrained by themselves, their respective agents and/or servants from levying distress for rent against the appellant and from interfering in any manner with the appellant's quiet possession and enjoyment of the property known as L.R. No. NAIROBI/BLOCK 94/239 Nyari,***

**Nairobi.”**

The application is supported by grounds stated on the face of the application and an affidavit sworn by the applicant.

In a nutshell, the applicant contends that he was formerly a tenant in premises known as LR No. Nairobi/Block 94/239 Nyari, (hereinafter referred to as the suit premises), belonging to the 1<sup>st</sup> respondent, Thara Orchards Limited. The premises comprised of a main house and a guest house. Pursuant to an agreement entered into between the applicant and the 1<sup>st</sup> respondent, the applicant’s tenancy agreement was substituted with another agreement appointing the applicant as an agent/manager of the suit property subject to the applicant retaining occupation of the guest house on the suit premises rent free as part of the consideration for his services. On that understanding, the applicant gave up the main house for renting by other tenants.

The applicant contends that on the instructions of the 1<sup>st</sup> respondent, the 3<sup>rd</sup> respondent has now proclaimed his goods with a view to distressing for alleged rent arrears. The applicant maintains that the purported distress for rent is illegal as there is no longer a tenancy relationship subsisting. The applicant pleads that unless the court grants the orders of injunction and stay of execution which he is seeking, he shall suffer severe and irreparable loss. The applicant further maintains that the trial magistrate in the lower court was wrong in striking out his suit which he had lodged against the respondents. He maintains that unless the orders sought by him are granted, his appeal which he has lodged against the orders of the trial magistrate, and which appeal has overwhelming chances of success, will be rendered nugatory.

Counsel for the applicant has urged the court to grant the orders sought so as to preserve the subject of the appeal. In this regard counsel relied on the following authorities: -

- (1) *Otieno vs Ougo & Another (No.2) [1987] KLR 400.***
- (2) *Kihui Mwiri Farmers Co. Ltd & 6 Others vs Benson Ngumi Job & 6 Others Civil Appeal No. Nai 162 of 1996.***
- (3) *Faraj Maharus vs J.B. Martin Glass Industries & Kenya Suit Case Manufacturers Ltd. Civil Application No. Nai 153 of 1998.***
- (4) *Patrick Njeri & 2 Others vs National Museum of Kenya HCCA No.492 of 2004.***
- (5) *Humphrey Kilambo Mcharo vs Kenya Commercial Bank Ltd & Another HCCC No.38 of 2003.***
- (6) *Fredrick Wambari Chege vs James Karume Wanjema & 2 Others Civil Application No. Nai 338 of 2004.***

Counsel for the applicant further submitted that the applicant has a good appeal as the trial magistrate was wrong in applying Section 159 of the Registered Land Act, as the applicant’s claim was not one relating to title or possession of land but was a claim in contract. Counsel maintained that the respondent would not suffer any prejudice if the orders sought were granted. He therefore urged the court that it was in the interest of justice that the orders sought do issue.

In response to the application, a statement of grounds of opposition was filed by the respondent contending *inter alia* that the application and the appeal is an abuse of the court process solely intended to enable the applicant avoid his legal obligations as a tenant of the 1<sup>st</sup> respondent. It is further contended that the applicant has no interest over the suit property which can be secured by the orders sought and that in any case under Section 159 of the Civil Procedure Act, the subordinate court in which the applicant sought to enforce his alleged rights lacks jurisdiction to deal with the matter. Referring to the tenancy agreement which was exhibited by the applicant, the respondent maintained that there was a tenancy agreement between the applicant and the respondents.

Counsel for the respondent submitted that the applicant had not shown any agreement confirming his allegation that he was an agent or caretaker of the suit premises. He submitted that the applicant was not entitled to possession of the suit premises as there was no longer any tenancy relationship subsisting between the applicant and the 1<sup>st</sup> respondent. He maintained that there was no arguable appeal to warrant the granting of the injunction sought. The court was urged to note that the applicant had failed to comply with the condition, upon which a temporary injunction was granted by this court on 30<sup>th</sup> September, 2008. Counsel for the respondent further submitted that there was an amount of Kshs.4.8 million owing from the applicant to the 1<sup>st</sup> respondent and therefore it would be unjust to grant the orders sought by the applicant.

From the notice of motion dated 30<sup>th</sup> September, 2008, the applicant has moved the court under Order XLI Rule 4 of the Civil Procedure Rules which deals with granting of orders of stay of execution or stay of proceedings during the pendency of an appeal. The applicant's suit having been struck out with costs, execution of the order of the lower court can only relate to the issue of costs. However, the graver man of the motion is essentially the prayer seeking an order of injunction restraining the respondent from levying distress against the applicant or interfering with his quiet possession and enjoyment of the suit property pending the hearing and determination of his appeal. Such an order can only be granted by this court under Order XLI Rule 4(6) of the Civil Procedure Rules which was not cited by the applicant.

Nevertheless, I have considered whether the applicant has satisfied the conditions upon which such interlocutory orders can be granted. Counsel for the applicant cited various authorities in support of his application. I found **High Court Civil Appeal No.492 of 2004, Patricia Njeri & 2 Others vs National Museum of Kenya**, quite helpful in identifying the guiding principles in considering such an application. I can do no more than quote Visram J. in the said judgment wherein he states as follows:

***“In the Venture Capital case the Court of Appeal said that an order for injunction pending appeal is a discretionary matter. The discretion must, however, be “exercised judicially and not in a whimsical or arbitrary fashion.” This discretion is guided by certain principles some of which are as follows:***

***(a) The discretion will be exercised against an applicant whose appeal is frivolous (see Madhupaper International Limited vs Kerr (1985) KLR 840 (cited in Ventured Capital). The applicant must state that a reasonable argument can be put forward in support of his appeal (J.K. Industries vs KCB (1982-88) KLR 1088 (also cited in Venture Capital).***

***(b) The discretion should be refused where it would inflict greater hardship than it would avoid (See Madhupaper supra).***

***(c) The applicant must show that to refuse the injunction would render his appeal nugatory (See Butt vs Rent Restriction Tribunal (1982) KLR 417 (cited also in Venture Capital).***

***(d) The Court should also be guided by the principles in Giella vs Cassman Brown & Company Ltd (1973) EA 358 as set out in the case of Shitukha Mwamodo & Others (1986) KLR 445 (also cited in Venture Capital).***

The applicant to this application has endeavoured to show that the substratum of his appeal is his effort to restrain the respondents from levying distress against him and interfering with his quiet possession and enjoyment of the suit property. It is obvious that if the court does not grant the orders of temporary injunction the respondent may proceed to levy distress and take possession of the suit premises and that will obviously render the pending appeal nugatory. Secondly, the applicant has filed a memorandum of appeal raising 4 grounds as aforesaid. Without preempting the merits of the appeal I can only state that the issue as to whether the court had jurisdiction to entertain the applicant's suit is an arguable issue. Thus it cannot be stated that the appellant's appeal is frivolous. It is evident that there is an issue as to whether the applicant has been a tenant in the suit premises liable to pay rent and upon whom distress can be levied. At this stage allegations have been made on either side and it may be difficult to gauge who has a better claim. The applicant has however satisfied this court that he is likely to suffer substantial loss if the orders are not granted. It is also evident that the applicant has brought this application without

unreasonable delay. Under Order XLI Rule 4(2) of the Civil Procedure Rules the conditions upon which an order for stay of execution can be granted includes; the applicant providing such security as the court may order for the due performance of the decree or order. The applicant herein was on 30<sup>th</sup> September, 2008, ordered to provide security of Kshs.1 million. The applicant failed to provide the required security. It is mandatory that where the court has required security the same be furnished. Moreover, in this case, the applicant is seeking an order of interlocutory injunction and it is necessary that an order for security be made so as to take care of whatever damages that may arise as a result of the interlocutory orders. For the above reasons, I will grant the application and issue orders in terms of prayers No. 3(a) and (b) of the notice of motion dated 30<sup>th</sup> September, 2008 on the following conditions

- (i) That the applicant shall deposit the sum of Kshs.1 million into this court within seven days from the date hereof, and thereafter a sum of Kshs.50,000/= monthly, at the commencement of each subsequent month, with effect from January, 2009.
- (ii) That the amount deposited shall remain in court as security.
- (iii) That the applicant shall file and serve a record of appeal within 90 days from the date hereof and take all necessary action to facilitate the speedy disposal of the appeal.
- (iv) In the event that the applicant fails to comply with either (i) or (iii) as above stated, the order of stay of execution and the injunction shall be discharged.
- (v) In the event that the appeal is not disposed off within 12 months from today, the orders for stay of execution and interlocutory injunction shall lapse unless otherwise ordered by this court.

Those shall be the orders of this court

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

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Sania for the applicant

Advocate for the respondent absent